NOV 29 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

No. 422

CAVU CLOTHES, INC.,
MONTIE M. BROHARD, Jr., and
THE MACK SHIRT CORPORATION,

*Petitioners,*

v.

SQUIRES, INC.,

*Respondent.*

---

**On Petition for Writ of Certiorari.**

---

## TRANSCRIPT OF RECORD

---

ROBERT S. MARX,
LEONARD D. SLUTZ,
900 Traction Bldg.,
Cincinnati 2, Ohio,
FRANK ZUGELTER,
GERALD B. TJOFLAT,
1710 First National Bank Bldg.,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

Of Counsel:
NICHOLS, WOOT, MARX & GINTER,
ZUGELTER AND ZUGELTER.

WARREN C. HORTON,
2300 Board of Trade Bldg.,
Chicago 4, Ill.,
EARL FREEMAN,
1 No. LaSalle St.,
Chicago, Ill.,
TRUMAN A. HERRON,
2301 Carew Tower,
Cincinnati 2, Ohio.
Attorneys for Respondent.

Of Counsel:
HINKLE, HORTON, AHLBERG, HANSMANN AND WUPPER,
FREEMAN AND FREEMAN,
WOOD, AREY, HERRON & EVANS.

THE JOHNSON & HARDIN CO., LAW PRINTERS
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IN THE

# District Court of the United States

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

---

**Civil Action No. 1847**

---

CAVU CLOTHES, INC., a corporation, MONTIE M. BROHARD, JR., and THE MACK SHIRT CORPORATION,

*Plaintiffs,*

v.

SQUIRES, INC., a corporation,

*Defendant.*

---

## BILL OF COMPLAINT

(Filed Jan. 27, 1948)

*To the Honorable Judges of the District Court of the United States in and for the Southern District of Ohio:*

I

This is a suit for infringement of United States Letters Patent No. 2428198, granted September 30, 1947, and relating to a Garment and No. Des. 146895 granted June 10, 1947, for a design for a Shirt, and is brought under the Patent Laws of the United States.

II

The plaintiff, Cavu Clothes, Inc., is a corporation organized and existing under the laws of the State of Ohio,

and is domiciled in the City of Cincinnati, Ohio. The plaintiff Montie M. Brohard, Jr., is a citizen of the State of Ohio and a resident of Cincinnati, State of Ohio.

III

The defendant, Squires Inc., upon information and belief, is a corporation organized and existing under the laws of the State of Ohio, and has a principal place of business at Cincinnati, State of Ohio.

IV

The jurisdiction of this court is based upon the Patent Laws of the United States of America.

V

The acts of infringement hereinafter complained of were and are being committed by the defendant in the City of Cincinnati, State of Ohio, within this district and elsewhere within the United States, since the granting of the letters patent aforesaid and prior to the filing of this complaint.

VI

United States Letters Patent No. Des. 146895 dated June 10, 1947, and United States Letters Patent No. 2428198 dated September 30, 1947, were duly and legally issued to plaintiff Montie M. Brohard, Jr., who then was and still is the legal owner of said letters patent. Plaintiff Montie M. Brohard, Jr., and co-plaintiff Cavu Clothes, Inc., have arranged for the granting of licenses to others under said patents for the manufacture and sale of articles embodying the inventions of said patents, and for the manufacture and sale of similiar articles by Cavu Clothes, Inc.

VII

Continuously since the granting of plaintiff's indicated letters patent, the patented articles manufactured and sold by the plaintiffs and their licensees have been marked with the statutory notice in compliance with 35 USCA Sec. 49; and in addition, the defendant has been served with written notice of its said infringements.

VIII

Articles embodying the inventions of said letters patent have been manufactured and sold in great numbers by the plaintiffs and their legally constituted licensees, but the continued profitable business in said articles has been and will continue to be impaired by the acts of infringement of the defendant, unless enjoined from continuing the acts of infringement complained of.

IX

Articles embodying the inventions of said letters patent have been accorded special favorable recognition by apparel experts for various reasons, and such articles when first produced and offered for sale by plaintiffs, enjoyed immediate and unusually ardent public acceptance on a large scale, the profits of which are being enjoyed by a number of licensees manufacturing under plaintiffs' said patents, for a substantial consideration.

X

The defendant, selling and trading in articles of an infringing nature obtained from one or more unauthorized sources of supply, has profited thereby and has brought damage and injury to the business of the plaintiffs, and by its said acts of infringement has induced others to in-

fringe plaintiffs' patents, to thereby further damage and injure the business of the plaintiffs herein; and the plaintiffs fear and have reason to fear continuing infringements on the part of the defendant.

WHEREFORE, plaintiffs demand an injunction against further infringement by defendant, an accounting for profits and damages, an assessment of costs and reasonable attorneys' fees against the defendant, and such other relief which to the court may seem just.

*Counsel for Plaintiffs:*

/s/ Robert S. Marx,
/s/ Frank E. Wood,
/s/ Leonard D. Slutz,
/s/ Jos. F. Zugelter.

*Of Counsel:*

/s/ Nichols, Wood, Marx & Ginter,
900 Traction Building,
Cincinnati 2, Ohio,
Telephone: MA 3128.

Zugelter & Zugelter,
/s/ Jos. F. Zugelter,
1710 First Nat'l Bank Bldg.,
Cincinnati 2, Ohio,
Telephone: CH 1021.

## ANSWER

(Filed March 16, 1948)

*To the Honorable Judges of the District Court of the United States in and for the Southern District of Ohio:*

For its answer to the Complaint, defendant says:

1. Defendant admits that this is a suit charging infringement of United States Letters Patent No. 2,428,198, granted September 30, 1947, and relating to a garment, and patent Des. 146,895, granted June 10, 1947, for a design for a shirt, and defendant admits that this suit is brought under the patent laws of the United States.

2. Defendant has no knowledge of the facts alleged in paragraph 2 thereof, and therefore denies the same.

3. Defendant admits the allegations of paragraph 3 thereof.

4. Defendant admits the allegations of paragraph 4 thereof.

5. Defendant denies each and every allegation of paragraph 5 thereof.

6. Defendant admits that United States design patent No. 146,895, dated June 10, 1947, and United States Letters Patent No. 2,428,198, dated September 20, 1947, were issued to one Montie M. Brohard, Jr. Defendant is without knowledge, however, and therefore denies, that the plaintiff Montie M. Brohard, Jr. then was, or still is, the legal owner of said patents. Defendant has no knowledge, and therefore denies, that plaintiff Montie M. Brohard, Jr., and coplaintiff Cavu Clothes, Inc., have arranged for the granting of licenses to others under said patents for the manufacture and sale of articles involving the alleged inventions of said patents, or for the manufacture and sale of similiar articles by plaintiff Cavu Clothes, Inc. Defendant further denies that said paragraph 6 of the com-

plaint contains any allegations of fact whatsoever to justify the presence of Cavu Clothes, Inc. as a plaintiff in said action, and defendant therefore denies that Cavu Clothes, Inc. is a proper party to said cause. Defendant therefore moves that said plaintiff Cavu Clothes, Inc. be dismissed as a party to this cause, at plaintiffs' costs.

7. Defendant admits that on or about January 2, 1948, it received a letter from plaintiffs' attorneys stating as follows:

> "Gentlemen:
>
> "We are advised by our clients, the Mack Shirt Corporation, and by Mr. Montie M. Brohard, Jr. of Cavu Clothes, Inc., that you have recently been selling diagonal zipper sport shirts which infringed United States design patent No. D-146,895 and United States mechanical patent No. 2,428,198, which were issued to Mr. Brohard.
>
> "We have been instructed by our clients to take immediate legal action to protect their rights under these patents. If you wish to discuss this matter with us, we will be glad to meet with you some time during the coming week. In view of the serious injury our clients are suffering, however, we cannot very well further delay legal action."

Said letter was dated December 31, 1947, but defendant denies that said letter constituted written notice of infringement as required by the statute, Title 35 U. S. C., Sec. 49, and asserts that it gave to defendant no information whatsoever as to the particular product alleged to be sold by it in infringement of said patents, or either of them. Defendant further states that said notice was purported to have been sent on behalf of Mack Shirt Corporation and Mr. Montie M. Brohard, Jr., and was not a written notice of infringement in accordance with the requirements

of the statutes, Title 35, U. S. C., Sec. 49. Defendant further asserts, on the basis of said letter of December 31, 1947, that the Mack Shirt Corporation has an interest of some kind in the patents in suit, and defendant therefore alleges that said corporation is a proper and necessary party to this suit in so far as defendant is at present informed; wherefore, defendant moves that this suit be dismissed for want of proper parties. Defendant further denies each and every other allegation contained in said paragraph 7 of the complaint.

8. In answer to the paragraph numbered 8 thereof, defendant denies that it has committed any acts in infringement of the letters patent in suit, and denies that it has caused any damage to either of the plaintiffs, and denies that there is any legal basis or equitable necessity for the issuing of an injunction. Defendant has no knowledge of the other allegations contained in said paragraph, and therefore denies the same. Defendant specifically denies that the plaintiffs, or either of them, are entitled to recover in this suit any damages or to have an injunction issued on behalf of their licensees who are not parties hereto.

9. Defendant has no knowledge of the allegations contained in paragraph 9 of the complaint, and therefore denies the same. Defendant further specifically denies that the profits of any licensees, not parties to this suit, are pertinent in any way to the issues of this suit, and defendant specifically denies that any favorable consideration should be given to either of the patents in suit by reason of the allegations of paragraph 9, inasmuch as it is there conceded that the alleged favorable recognition of articles embodying the alleged inventions of said letters patent was accorded for various reasons which are not set forth in the complaint, and could therefore have been due to many

circumstances other than patentable novelty of either of the letters patent in suit.

10. Defendant is without information upon which to base a full and complete answer to paragraph 10 of the complaint, inasmuch as said paragraph fails to identify the articles alleged to have been sold by defendant in infringement of said patents. Said paragraph fails to state in any way the authorized sources of supply of said articles, and does not identify in any way the "one or more unauthorized sources of supply" from which defendant is alleged to have obtained articles of an infringing nature. Defendant denies each and every other allegation contained in said paragraph 10 of the complaint.

11. Defendant denies that plaintiffs, or either of them, are entitled to any of the relief prayed for in said complaint, and defendant prays that it may be dismissed, with an assessment of costs and reasonable attorneys' fees against the plaintiffs, and for such other relief as the Court may seem just.

12. Defendant denies each and every allegation of said complaint not herein expressly admitted or denied.

13. As a further and express defense, defendant asserts that each of the letters patent in suit is invalid, void, and of no effect, for the reason that the applicants therefor surreptitiously and unjustly obtained a patent for that which was in fact invented by another, if any invention was involved therein, and who was using reasonable diligence in adapting and perfecting the same.

14. As a further and express defense, defendant asserts that letters patent No. 2,428,198, is clearly invalid for double patenting, in that it sets forth nothing new or additional of a patentable nature over that set forth in design patent No. D-146,895. Defendant further asserts that the

simultaneous prosecution of applications for said letters patent, and the continued prosecution of the application for patent No. 2,428,198, after the issuance of design patent No. D-146,895, constituted a fraud upon the Patent Office and the public, and that plaintiffs therefore come into this Court with unclean hands with respect to the subject matter of this suit, and should be entitled to no relief whatsoever from this Court.

15. As a further and express defense, defendant asserts that each of said letters patent in suit had been finally rejected by the Patent Office as presenting nothing of patentability, and each was later allowed by the Patent Office without the citation of additional art, but upon ex parte allegations of commercial success and acceptance by the public, which were untrue in fact, and which even if true, afforded no basis for patentability or grant of either of said letters patent. Defendant alleges that said patents, and each of them, were obtained as the result of fraudulent and untrue representations made to the Patent Office, and upon grounds which afforded no patentability to either of the applications in question; wherefore, the Patent Office should have, and would have, denied issuance of either of said letters patent had the true law and the true facts been presented to it. Defendant therefore alleges that said letters patent, and each of them, are void and of no effect, and should be canceled and declared void *ab initio*.

16. As a further and express defense, defendant asserts that the letters patent in suit No. 2,428,198, is ambiguous, indefinite, and functional in language, and does not particularly point out and distinctly claim the alleged invention, and fails to set forth any invention in such full, clear, concise, and exact terms as to enable persons skilled in the art to make, use, or construct the same; wherefore,

defendant asserts that said Letters Patent are invalid, void, and of no effect.

17. As a further and express defense, defendant asserts that the scope of the claims of each of the Letters Patent in suit is so restricted and limited by the proceedings in the Patent Office prior to the issuance of each of said Letters Patent, that such claims, and each of them, if valid at all are not entitled to any construction which would include or cover any device sold or offered for sale by defendant; wherefore, defendant denies infringement of each of said Letters Patent and of the claims thereof.

18. As a further and express defense, defendant asserts that the state of the prior art existing at the time of each of said alleged inventions set forth in the claims of each of the Letters Patent in suit, was such that the alleged improvement set forth therein did not involve invention, but represented at most the exercise of mere mechanical skill, or the mere skill of the designer; wherefore, defendant asserts that said Letters Patent, and each of them, are invalid, void, and of no effect.

19. As a further and express defense, defendant asserts that the claims of each of the Letters Patent in suit are invalid, void, and of no effect, for the following reasons:

(a) That the structures and devices described and claimed in the claims of each of the Letters Patent in suit, respectively, or material and substantial parts thereof, were patented or described in printed publications prior to the alleged invention and discovery thereof by the applicant for each of said Letters Patent in suit, or more than one year prior to the respective applications therefor, as follows:

WITH RESPECT TO U. S. DESIGN PATENT
No. D-146,895

| PATENT NO. | PATENTEE | DATE ISSUED |
|---|---|---|
| 2,143,931 | Aronson | Jan. 17, 1939 |
| D-113,201 | Coleman | Jan. 31, 1939 |
| 499,788 | Hascall | June 20, 1893 |
| 329,999 | Emanuel | Oct. 27, 1885 |
| 1,038,821 | Baldwin | Sept. 17, 1912 |
| 1,971,622 | Quackenbust | Aug. 28, 1934 |
| 2,248,288 | Selib | July 8, 1941 |
| 1,993,297 | Greenberg | Mar. 5, 1935 |
| 2,007,982 | Rohn | July 16, 1935 |
| 1,675,113 | Lake | June 26, 1928 |
| 2,139,270 | Humphlett | Dec. 6, 1938 |
| 2,010,349 | Cooper | Aug. 6, 1935 |
| 570,081 | Beach | Oct. 27, 1896 |
| 1,951,240 | Gold | Mar. 1, 1934 |
| 2,102,039 | Sinskey | Dec. 14, 1937 |
| 310,095 | Tower | Dec. 30, 1884 |
| 2,013,833 | Papageorge | Sept. 10, 1935 |
| 2,093,792 | Yangst | Sept. 21, 1937 |

Br. 376,657 of 1932
Br. 428,833 of 1935
Ger. 502,889 to Mueller
Sears Roebuck & Co. Catalog of 1940, page 407, item 41F5650

*With Respect to U. S. Patent No. 2,428,198.*

Each of the patents and publications in the foregoing list, and in addition thereto U. S. Design patent No. D-146,-895 to Brohard, June 10, 1947 and also in other patents and printed publications, the names, dates, numbers, and authors of which are not at present known to the defendant, but which when ascertained defendant prays leave to add hereto.

(b) That the applicant for each of the Letters Patent in suit was not the original and first inventor of the article

patented thereby, or of any material or substantial part thereof, but that prior to the alleged invention thereof by the applicant invented by, or known to, the respective applicants for each of the Letters Patent listed in the foregoing paragraph (a) hereof, at the addresses given in their respective patents and applications, and in the office of Sears Roebuck & Co., Chicago, Illinois, and also by others not now known to defendant, but which when ascertained defendant prays leave to add hereto.

(c) That more than one year prior to the filing of each of the applications for the Letters Patent in suit, and prior to any date to which the applicant for said applications is lawfully entitled, the structures and devices constituting the alleged inventions thereof had been in public use or on sale in the United States by the plaintiffs and alleged licensees under said Letters Patent, and by the patentees and the assignees of the patents listed in paragraph (a) hereof, at the addresses given in their respective patents and applications therefor, and also by others not now known to this defendant, but which when ascertained defendant prays leave to add hereto.

19. As a further and separate defense, defendant alleges that patent No. 2,428,198 in suit, is utterly invalid and void, in that it attempts to cover and claim the mere design of an article by a patent having a life of 17 years, whereas the statutes of the United States limit such patents to a term of 14 years at the most, whereby defendant attempted to obtain an unlawful and illegal monopoly in abuse of the privileges granted to inventors under the patent laws of the United States; wherefore, said Letters Patent are invalid.

Having answered so much of plaintiffs' complaint as defendant is advised it is material and necessary to answer,

defendant asserts that it has not committed any of the acts of infringement charged by the plaintiffs, and has not infringed or violated any valid rights owned by plaintiffs.

WHEREFORE, defendant prays that the complaint herein be dismissed and that defendant recover its costs and expenses incurred herein, together with reasonable attorneys' fees, which costs, expenses, and attorneys' fees should be in a substantial amount completely to cover the defendant's expenditures in this regard, inasmuch as plaintiffs know, or must have known, that both patents are invalid, or at least that one of said patents must have been invalid in view of the issuance of the other.

SQUIRES, INC.

By /s/ HINKLE, HORTON, AHLBERG, HANSMANN & WUPPER,
HINKLE, HORTON, AHLBERG, HANSMANN & WUPPER,

By /s/ FREEMAN & FREEMAN,
FREEMAN & FREEMAN,

By /s/ WOOD, AREY, HERRON & EVANS,
WOOD, AREY, HERRON & EVANS,
2801 Carew Tower,
Cincinnati 2, Ohio,
*Attorneys for Defendant.*

/s/ WARREN C. HORTON,
WARREN C. HORTON,

/s/ EARL FREEMAN,
EARL FREEMAN,

/s/ TRUMAN A. HERRON,
*Of Counsel.*

## DEFENDANT'S INTERROGATORIES

(Filed March 31, 1948)

Now comes the defendant, by its attorneys, pursuant to Civil Practice Rule 33, and propounds the following interrogatories to be answered on behalf of the plaintiffs, under oath, by such officer or agent thereof as may have knowledge of the facts inquired into:

1. When did each of the plaintiffs first make a shirt like that illustrated in each of the patents in suit?

2. When did each of the plaintiffs first have in his or its possession a shirt like that illustrated in each of the patents in suit?

3. Does either of the plaintiffs now have in his or its possession the shirt referred to in answer to the foregoing interrogatories 1 or 2?

4. If the answer to the foregoing interrogatory is in the affirmative, when and where may said shirt or shirts be examined by the defendant?

5. When, where, and to whom did each of the plaintiffs first sell a shirt like that illustrated in each of the patents in suit?

6. What is the nature of the interest of plaintiff Cavu Clothes, Inc. in, to or under the patents in suit?

7. If plaintiff Cavu Clothes, Inc., claims an interest either as an owner or as a licensee under the patents in suit, or either of them, produce and supply to defendant a true copy of any written assignment or license under which said plaintiff asserts such interest.

8. Name each of the licensees of the plaintiffs, or either of them, to whom reference is made in paragraphs VII, VIII, and IX of the complaint, and produce copies of each of the licenses which plaintiffs, or either of them, have granted under one or both of the patents in suit.

*Defendant's Interrogatories*

9. What arrangements have plaintiffs made for the granting of licenses to others, as referred to in paragraph VI of the complaint?

10. Who are the apparel experts referred to in paragraph IX of the complaint, and what is the present address of each such expert?

11. What special favorable recognition has been accorded by experts, and what are the various reasons therefor, which are referred to in paragraph IX of the complaint?

12. If the "favorable recognition" and the "various reasons" referred to in paragraph IX of the complaint, or any part thereof, are set forth in written or printed documents, supply defendant with copies thereof, or state where the same may be inspected by the defendant.

13. Specify each of the "one or more unauthorized sources of supply" referred to in paragraph X of the complaint.

14. To what extent have plaintiffs and their licensees advertised in newspapers and magazines, products made under one or both of the patents in suit?

15. What, if any, interest does the Mack Shirt Corporation have in, to, or under the letters patent in suit, or either of them, and if said interest of the Mack Shirt Corporation is set forth in a written assignment or written license, supply defendant with copies thereof.

SQUIRES, INC.,

By HINKLE, HORTON, AHLBERG, HANSMANN & WUPPER,

*Attorneys for Defendant.*

## PLAINTIFFS' ANSWER TO INTERROGATORIES

(Filed May 14, 1948)

Now come the plaintiffs, and in answer to the interrogatories propounded by defendant, state as follows:

1. Answering interrogatory No. 1, the plaintiffs collaborated in first making a shirt of the kind patented, late in the year 1943.

2. Answering interrogatory No. 2, the first shirts in the possession of the plaintiffs, and corresponding to the patents, are those referred to in the foregoing answer and therefore the answer is "late in the year 1943."

3. The answer to interrogatory No. 3 is "No."

4. Answer to interrogatory No. 4 not required in view of answer to No. 3.

5. Answering interrogatory No. 5, only the plaintiff Cavu Clothes, Inc., sold shirts corresponding to the patents in suit, and the first of such shirts were sold May 2, 1944, to Saks, Fifth Avenue, New York City, and to J. E. Curtis Supply Company, Bartlesville, Oklahoma, on April 7, 1944.

6. Answering interrogatory No. 6, Cavu Clothes, Inc. is an exclusive licensee with power to grant sub-licenses under the patents in suit.

7. Answering interrogatory No. 7, plaintiff Cavu Clothes Inc. is licensed orally by the patentee Brohard, Jr., to make, use and sell garments under the patents in suit, and to sub-license others to do the same.

8. Answering interrogatory No. 8, the licensees are: (1) The Mack Shirt Corporation, Cincinnati, Ohio, (2) The United States Government, (Navy Department), (3) Marlboro Shirt Company, of Baltimore, Maryland, (4) Winston Sportswear Company, of New York, New York.

9. Answering interrogatory No. 9, the licensees named in the preceding paragraph hereof are referred to.

10. Answering interrogatory No. 10, the apparel experts referred to are: Bernard Rudofsky, 227 East 57th Street, New York 22, N. Y.; Stanley Marcus, of Neiman-Marcus, Dallas, Texas; Dorothy Abbott, of Bonwit-Teller, Fifth Avenue, New York City; Lt. Commander Mary B. Heck, Navy Department, Washington, D. C.

11. Answering interrogatory No. 11, reference is made to Life Magazine, issue of May 26, 1947, which on pages 119 and 120, illustrate plaintiffs' patented shirts featured in a sensational fashion show held in April 1947 near Bandera, Texas, where the fashion jury awarded high honors to an aviation ensemble including the patented shirt in suit.

Reference is made further, to a book of Bernard Rudofsky entitled ARE CLOTHES MODERN? published in 1947 by Paul Theobald, Chicago, Illinois, and which on page 127 features the garment of the patents in suit, as a departure from convention. This same garment has won a place in the Museum of Modern Art, New York City.

The Navy Department of the United States Government has considered adoption of the patented shirt for use by female personnel in flying service, because of the superior protection afforded thereby to the throat and chest of the wearer. This attribute is recognized by the several experts named, and by merchandisers, who recognize also the novelty of design inherent in the garment.

12. Answering interrogatory No. 12, reference is made to the aforesaid Life Magazine article, and the book of Rudofsky, mentioned in paragraph 11 above. These references appear to stress the novelty of design of the garment. Its utilitarian features are recognized by the Navy Department, but no written document is presently available in support thereof.

13. Answering interrogatory No. 13, the information requested is within the knowledge of the defendant, dealing in the infringing garments marked CORSAIR BY SPECTATOR. Plaintiffs cannot specify the soruce or sources of supply, other than to state that they are unlicensed sources.

14. Answering interrogatory No. 14, plaintiffs have advertised the patented products in newspapers and magazines to a negligible extent, and at an expense of considerably less than $2,000.00. So far as plaintiffs are informed at present, no appreciable amount of advertising in newspapers and magazines has been engaged in by any of plaintiffs' licensees.

15. Interrogatory No. 15 is objectionable.

/s/ MONTIE M. BROHARD, JR.

STATE OF OHIO, }
COUNTY OF HAMILTON } ss:

Montie M. Brohard, Jr., upon being first duly sworn, deposes and says that he is one of the plaintiffs in the above cause, and that his foregoing answers to interrogatories propounded by defendant therein, are true to the best of his knowledge and belief.

/s/ LILLIAN WEISSHAAR,

LILLIAN WEISSHAAR,
*Notary Public, Hamilton County, Ohio.*

My Commission Expires, Mar. 16, 1949.
(SEAL)

Service Acknowledged,
May 14, 1948,
/s/ TRUMAN A. HERRON,
*Attorney for Defendant.*

## AMENDMENT TO PLAINTIFFS' ANSWERS TO INTERROGATORIES

(Filed June 18, 1948)

Plaintiffs hereby amend the answer to Interrogatory No. 8, by deleting from the list of plaintiffs' licensees, the Marlboro Shirt Company, of Baltimore, Maryland, said company having been included in the list of licensees by mistake, as more fully explained in the following affidavit.

Respectfully,

/s/ ZUGELTER & ZUGELTER,
*Counsel for Plaintiffs.*

### AFFIDAVIT OF MONTIE M. BROHARD, JR.

Montie M. Brohard Jr., upon being duly sworn, deposes and says that is is one of the plaintiffs named in the above captioned cause; that he furnished the information necessary to the preparation of a pleading therein entitled "Plaintiffs' Answer to Interrogatories," which was filed with the clerk of The United States District Court at Cincinnati, Ohio, on or about May 14, 1948; that he signed said pleading; that by mistake, the name of Marlboro Shirt Company, of Baltimore, Maryland, was included in the list of plaintiffs' licensees, whereas in fact neither he nor Cavu Clothes, Inc., the co-plaintiffs in the indicated cause, has any form of patent license arrangement with said Marlboro Shirt Corporation; that he, as president of said Cavu Clothes, Inc., of his own knowledge definitely knows that no patent license exists between said Cavu Clothes, Inc., and said Marlboro Shirt Company; and that said Interrogatory No. 8 is in error to the extent that it names Marlboro Shirt Company as a licensee of the plaintiffs.

/s/ MONTIE M. BROHARD, JR.

STATE OF OHIO,
COUNTY OF HAMILTON } ss:

Before me, a notary public, personally appeared Montie M. Brohard Jr., known to me to be the person named in the foregoing statement, and who signed said statement in my presence making oath as to the truth thereof, this 17th day of June, 1948.

/s/ ROBERT TOBLER,
*Notary Public, Hamilton County, Ohio.*

My Commission Expires, April 26, 1949.

(SEAL)

Service acknowledged, June 18, 1948,

/s/ TRUMAN A. HERRON,
*Attorney for Defendant.*

## PLAINTIFFS' ANSWER TO INTERROGATORIES 8 and 15

(Filed June 25, 1948)

To answer fully the defendant's interrogatories Nos. 8 and 15, plaintiffs hereby supply photostatic copies of the following license agreements.

1. License Agreement dated June 12, 1947 (executed June 13, 1947) between The Mack Shirt Corporation and Cavu Clothes, Inc.

2. Supplementary Agreement Modifying License Contract of June 12, 1947.

3. Modification of Agreement (executed May 5, 1948).

4. Agreement between Cavu Clothes, Inc., and Winston Sportswear Company, effective as of December 31, 1947.

5. License from Cavu Clothes, Inc., to the United States Government, dated February 5, 1948.

In all of the above copies, the amounts of royalties payable, along with other inconsequential data, have been blanked out as having no bearing upon the questions of validity and infringement of the patents in suit.

Counsel for defendant has been supplied with copies of the five agreements listed.

/s/ ZUGELTER & ZUGELTER,
/s/ JOS. F. ZUGELTER,
*Counsel for Plaintiffs.*

Service acknowledged this 25th day of June 1948.
/s/WARREN C. HORTON,
/s/ TRUMAN A. HERRON,
*Counsel for Defendant.*

(Copies of agreements attached.)

## NOTICE OF ADDITIONAL DEFENSES

(Filed Nov. 26, 1948)

*To:*

ZUGELTER & ZUGELTER,
1710 First National Bank Building,
Cincinnati, Ohio,

NICHOLS, WOOD, MARX & GINTER,
900 Traction Building,
Cincinnati, Ohio,
*Attorneys for Plaintiffs.*

Now comes the defendant, by its attorneys, and gives notice to the plaintiffs, pursuant to Section 69, Title 35, U. S. C., of the following defenses which defendant will rely on at the trial of this cause, in addition to those listed in Section 19 of defendant's answer.

1. As additional patents and printed publications under subparagraph (a) of section 19 of the answer, defendant will also rely upon:

| PATENT NO. | PATENTEE | DATE ISSUED |
|---|---|---|
| 167,139 | Underdown | Aug. 24, 1875 |
| 570,081 | Beach | Oct. 27, 1896 |
| 1,112,248 | Baldwin | Sept. 29, 1914 |
| 1,626,136 | Hart | Apr. 26, 1927 |
| 1,973,421 | Wallace | Sept. 11, 1934 |
| 2,160,096 | Swan | May 30, 1939 |
| D-114,021 | Karplus | Mar. 28, 1939 |
| D-129,909 | Turcotte | Oct. 7, 1941 |
| D-130,692 | Lardner | Dec. 9, 1941 |

Angelica Jacket Co. Catalog No. 541, of 1941, pages 4 and 5.

2. The applicants for each of the Letters Patent above listed, and Angelica Jacket Co. of 1419 Olive Street, St. Louis, Missouri, will also be relied upon by defendant under the allegations of subparagraph (b) of Section 19 of the answer.

3. As additional instances of prior invention and prior knowledge under the allegations of subparagraph (b) of section 19 of the answer, and additional instances of prior public use and sale under the allegations of subparagraph (c) of section 19 of the answer, defendant, in addition to the patents and publications listed above and in the answer, will rely upon the following companies and individuals:

(a) Fox-Knapp Manufacturing Company, through David B. Knapp, and other employees thereof, whose address is 230 Fifth Avenue, New York City.

(b) United Sheep Lined & Leather Clothing Co., through Robert L. Smith, and other employees thereof, whose address is 1182 Broadway, New York City.

(c) Shirtcraft Company, Inc., through Charles Kaplan, and other employees thereof, whose address is Empire State Building, 350 Fifth Avenue, New York City.

(d) R. H. Macy & Co., through Richard Bettes, and other employees thereof, whose address is 34th Street and Broadway, New York City.

(e) Angelica Jacket Co., having offices at 1419 Olive Street, St. Louis, Missouri, 1101 South Main Street, Los Angeles, California, 177 North Michigan Avenue, Chicago, Illinois, and 107 West 48th Street, New York City, through Louis Karger, whose address is 177 North Michigan Avenue, Chicago, Illinois, and other employees thereof, at the several offices of said company.

4. At the opening of the trial of this cause, defendant will move to amend its answer to incorporate the additional instances of prior patenting, prior invention, prior knowledge, and prior public use and sale, as listed in the foregoing notice.

HINKLE, HORTON, AHLBERG, HANSMANN & WUPPER,
FREEMAN & FREEMAN,
WOOD, AREY, HERRON & EVANS,
*Attorneys for Defendant.*

WARREN C. HORTON,
EARL FREEMAN,
TRUMAN A. HERRON,
*Of Counsel.*

## AMENDMENT TO ANSWER

(Filed Feb. 14, 1949)

Now comes the defendant, by its attorneys, pursuant to notice heretofore given to plaintiffs, and pursuant to Section 69, Title 35, U. S. C., and amends its answer in the above entitled cause as follows:

1. By adding to the list of patents and publications in section 19, subparagraph (a), pages 7 and 8 of the answer, the following:

| PATENT NO. | PATENTEE | DATE ISSUED |
|---|---|---|
| 167,139 | Underdown | Aug. 24, 1875 |
| 570,081 | Beach | Oct. 27, 1896 |
| 1,112,248 | Baldwin | Sept. 29, 1914 |
| 1,626,136 | Hart | Apr. 26, 1927 |
| 1,973,421 | Wallace | Sept. 11, 1934 |
| 2,160,096 | Swan | May 30, 1939 |
| D-114,021 | Karplus | Mar. 28, 1939 |
| D-129,909 | Turcotte | Oct. 7, 1941 |
| D-130,692 | Lardner | Dec. 9, 1941 |

Angelica Jacket Co. Catalog No. 541, of 1941, pages 4 and 5.

2. By adding to section 19, subparagraph (b), page 8 of the answer, the applicants for each of the Letters Patent above listed, and Angelica Jacket Co. of 1419 Olive Street, St. Louis, Missouri.

3. By adding as additional instances of prior invention and prior knowledge under the allegations of subparagraph (b) of section 19 of the answer, appearing on page 8 thereof, and additional instances of prior public use and sale, under the allegations of subparagraph (c) of section 19 of the answer, appearing on page 9 thereof, the following companies and individuals:

> Fox-Knapp Manufacturing Company, through David B. Knapp, and other employees thereof, whose address is 230 Fifth Avenue, New York City.

Shirtcraft Company, Inc., through Charles Kaplan, and other employees thereof, whose address is Empire State Building, 350 Fifth Avenue, New York City.

Angelica Jacket Co., having offices at 1419 Olive Street, St. Louis, Missouri, 1101 South Main Street, Los Angeles, California, 177 North Michigan Avenue, Chicago, Illinois, and 107 West 48th Street, New York City, through Louis Karger, whose address is 177 North Michigan Avenue, Chicago, Illinois, and other employees thereof, at the several offices of said company.

SQUIRES, INC.,

By HINKLE, HORTON, AHLBERG, HANSMANN & WUPPER, FREEMAN & FREEMAN, WOOD, AREY, HERRON & EVANS,
*Attorneys for Defendant.*

WARREN C. HORTON,
EARL FREEMAN,
TRUMAN A. HERRON,
*Of Counsel.*

## ORDER MAKING THE MACK SHIRT CORPORATION A NEW PARTY PLAINTIFF

(Filed June 1, 1949)

Pursuant to the motion of the plaintiffs made during the hearing of this action on February 16, 1949, and with the consent of the defendant, it appearing to the Court that the Mack Shirt Corporation is a proper party plaintiff, it is hereby ordered that the said Mack Shirt Corporation be, and it hereby is, made an additional party plaintiff in this cause. Said corporation is hereby granted leave to file its entry of appearance and complaint, and the answer of the defendant together with all amendments thereto heretofore filed shall stand and be considered for all purposes as the

answer of the defendant to said complaint of the Mack Shirt Corporation.

/s/ DRUFFEL, J.

*Satisfactory:*
/s/ WARREN C. HORTON
/s/ LEONARD D. SLUTZ

## ENTRY OF APPEARANCE AND COMPLAINT OF THE MACK SHIRT CORPORATION

(Filed Jun. 1, 1949)

The Mack Shirt Corporation, a corporation organized and doing business under the laws of the State of Ohio, having been made an additional party plaintiff to this action, hereby waives service of summons upon it, voluntarily enters its appearance, and adopts all allegations of the complaint heretofore filed by the plaintiffs, joins in the prayer thereof, and prays for all other legal or equitable relief to which it may be entitled.

/s/ ROBERT S. MARX,
/s/ LEONARD D. SLUTZ,
/s/ FRANK ZUGELTER,
/s/ GERALD B. TJOFLAT,
*Attorneys for the Mack Shirt Corporation.*

*Of Counsel:*
NICHOLS, WOOD, MARX & GINTER
ZUGELTER & ZUGELTER

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed July 18, 1949)

Upon consideration of the pleadings and the evidence, the Court hereby makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. This is an action instituted under the patent laws of the United States for injunction, damages and costs based upon alleged patent infringements. The plaintiffs, Cavu Clothes, Inc., and The Mack Shirt Corporation, are both Ohio corporations with their principal place of business at Cincinnati, Ohio. The plaintiff, Montie M. Brohard, Jr., is a citizen of the State of Ohio, with his residence within said State in the City of Cincinnati. The defendant, Squires, Inc., is an Ohio corporation with its principal place of business at Cincinnati, Ohio.

2. United States Letters Patent No. Design 146895, dated June 10, 1947, and United States Letters Patent No. 2428198, dated September 30, 1947, were both issued to the plaintiff, Montie M. Brohard, Jr. Mr. Brohard has licensed the plaintiff, Cavu Clothes, Inc., to make, use and sell garments under said patents and to grant sublicenses to others. Mr. Brohard and Cavu Clothes, Inc., have joined to license the plaintiff, The Mack Shirt Corporation, to be the exclusive manufacturer and distributor under said patents of men's and boys' shirts in all fabrics containing up to 60 percent of wool or other animal matter.

3. Prior to the filing of this action, defendant, Squires, Inc. was given notice as to the issuance of each of the letters patent in suit, and of its alleged infringement thereof, and said defendant, Squires, Inc., after receipt of said notice, continued to sell shirts like plaintiffs' Exhibit 1 charged to infringe.

4. Between November 17, 1947 and October 28, 1948, the defendant, Squires, Inc., purchased sport shirts bearing the brand name "Corsair" from the Spectator Sportswear Co., of Chicago, Illinois, and without right or license from the plaintiffs, sold such shirts in the City of Cincinnati, Ohio.

5. In open court, Warren C. Horton, of counsel representing defendant, Squires, Inc., stated that he expected to be paid for his services in this case by Spectator Sportswear Co.

## AS TO THE DESIGN PATENT

6. The sport shirt shown by Design Patent D-146895, discloses an unusually attractive appearance, the design being new, original, ornamental and the product of invention.

7. When the sport shirts manufactured by Cavu Clothes, Inc., and The Mack Shirt Corporation under said patent were offered to the trade they met with remarkable and unusual acceptance and approval on the part of both the retailers and the consuming public. Such acceptance is persuasive that the design was new, distinctive, and attractive to the eye of the average purchaser.

8. In the eye of an ordinary observer, giving such attention as a purchaser usually gives, the design of the "Corsair" sport shirt sold by the defendant is substantially the same as that covered by said design patent.

## AS TO THE MECHANICAL PATENT

9. In view of the state of the prior art, the features of construction disclosed by said U. S. Patent 2428198, although novel and useful, represented only the exercise of mechanical skill rather than patentable invention.

## CONCLUSIONS OF LAW

A. The plaintiffs, Cavu Clothes, Inc., Montie M. Brohard, Jr., and The Mack Shirt Corporation, are, together, owners of the entire legal and equitable title and interest to and in the patents in suit. They are properly joined and have the legal and equitable right to maintain this suit.

B. This court has jurisdiction of the action.

C. U. S. Design Patent 146895 is new, original, ornamental, and the product of invention; and said patent is good and valid in law.

D. The sales by the defendant of the "Corsair" sport shirt constitute an infringement of said design patent.

E. U. S. Patent No. 2428198 involved only the exercise of mechanical skill rather than patentable invention, and said patent is therefore invalid in law.

F. The plaintiffs are entitled to due compensation for the infringement of said design patent and to an injunction restraining the defendant from further infringement thereof.

G. The plaintiffs are entitled to recover from the defendant their costs herein expended as to the design patent and the defendant is entitled to recover from the plaintiffs its costs as to the mechanical patent.

/s/ DRUFFEL, J.

**DECREE**

(Entered July 18, 1949)

This cause came on to be heard at the February, 1949, Term and was tried in open court on February 14, 15 and 16; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That United States Letters Patent, Design No. 146,895, granted June 10, 1947 to plaintiff, Montie M. Brohard, Jr., is good and valid in law as to the claim thereof.

2. That plaintiffs, Montie M. Brohard, Jr., Cavu Clothes, Inc., a corporation, and Mack Shirt Corporation, a corporation, are possessed of the full and entire right, title and interest in and to said Letters Patent, together with all rights of action for past infringement thereof.

3. That defendant, Squires, Inc., a corporation, has infringed the claim of said Letters Patent, Design No. 146,895,

by selling the shirt exemplified by plaintiff's Exhibit 1 herein, and known as the "Corsair" shirt.

4. That United States Letters Patent No. 2,428,198, granted September 30, 1947, to plaintiff, Montie M. Brohard, Jr., is invalid in law as to the single claim thereof.

5. That plaintiffs, Montie M. Brohard, Jr., Cavu Clothes, Inc., a corporation, and Mack Shirt Corporation, a corporation, are possessed of the full and entire right, title and interest in and to said Letters Patent 2,428,198, together with all rights of action for past infringement thereof.

6. That plaintiffs, Montie M. Brohard, Jr., Cavu Clothes, Inc., and Mack Shirt Corporation, recover from defendant, Squires, Inc., compensation in such amount as is provided for by the terms and provisions of Sections 67 and 70 of Title 35, United States Code Annotated.

7. That a perpetual injunction be issued out of and under the seal of this court restraining the defendant, Squires, Inc., its officers, agents, servants and employees, and each and every one of them from directly or indirectly making, using, or selling or causing to be made, used or sold, any shirt embodying the invention claimed in said the claim of said Letters Patent, Design No. 146,895, and specifically from directly or indirectly using or selling, or causing to be used or sold, defendant's shirt, exemplified by Plaintiff's Exhibit No. 1 herein, and from in any way infringing upon said claim of said Letters Patent or upon the rights of the plaintiffs under said claim.

8. That the defendant pay to the plaintiffs their costs in said suit to be taxed with respect to the design patent and that said plaintiffs pay to the defendants their costs in said suit to be taxed with respect to the mechanical patent.

/s/ JOHN H. DRUFFEL,
*United States District Judge.*

## NOTICE OF APPEAL
### (By Plaintiffs)
(Filed Aug. 15, 1949)

Notice is hereby given that Cavu Clothes, Inc., Montie M. Brohard, Jr., and Mack Shirt Corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit, from those portions of the Decree entered in this action on July 18, 1949, wherein United States Letters Patent No. 2,428,198 granted September 30, 1947, to plaintiff, Montie M. Brohard, Jr., was adjudged and decreed to be invalid in law as to the single claim thereof, and wherein it was ordered, adjudged, and decreed that said plaintiffs pay to the defendants their costs in said suit to be taxed with respect to the mechanical patent, said portions being found in the fourth and eighth paragraphs of said Decree.

/s/ Robert S. Marx,
/s/ Frank Zugelter,
/s/ Gerald B. Tjoflat,
/s/ Leonard D. Slutz,
*Counsel for Plaintiffs-Appellants.*

## NOTICE OF APPEAL
### (By Defendant)
(Filed Aug. 15, 1949)

NOTICE IS HEREBY GIVEN that Squires, Inc., defendant above named, hereby appeals to the Court of Appeals for the Sixth Circuit, from so much of the judgment of July 18, 1949, as adjudges that United States Letters Patent Des. No. 146,895, is good and valid in law, and adjudges that defendant, Squires, Inc., has infringed the claim of said Design Letters Patent by selling the shirt exemplified by Plaintiffs' Exhibit 1 herein, and adjudges

that plaintiffs are entitled to recover from defendant compensation as provided by Sections 67 and 70 of Title 35 U. S. C., and adjudges that an injunction be issued against the defendant, and adjudges that defendant pay to plaintiffs costs in this suit with respect to the said design patent in suit.

/s/ WARREN C. HORTON,
2300 Board of Trade Building,
Chicago 4, Illinois,

/s/ TRUMAN A. HERRON,
Carew Tower,
Cincinnati, Ohio,
*Attorneys for Defendant.*

## ORDER SETTING TIME FOR DOCKETING RECORDS ON APPEAL

(Entered Sept. 21, 1949)

The plaintiffs in the above entitled cause having filed notice of appeal on August 15, 1949 from certain portions of the decree and judgment entered herein on July 18, 1949, and the defendant on August 15, 1949 having filed a notice of appeal from certain portions of said judgment and decree of July 18, 1949, and counsel for the parties having consented hereto:

IT IS ORDERED, pursuant to Rule 73(g) of the Rules of Civil Procedure, that the time within which the parties may file their records on appeal is fixed at October 29, 1949.

/s/ JOHN H. DRUFFEL,
*United States District Judge.*

Now comes the parties hereto by their respective counsel and hereby consent to the entry of the foregoing order forthwith.

/s/ LEONARD D. SLUTZ,
*Counsel for Plaintiffs.*

/s/ WARREN C. HORTON,
*Counsel for Defendant.*

## TRANSCRIPT OF EVIDENCE

Met, pursuant to notice on Monday, February 14, 1949.

BEFORE:

JUDGE JOHN H. DRUFFEL.

APPEARANCES:

*For Plaintiffs,*

ROBERT S. MARX, and LEONARD D. SLUTZ of Nichols, Woods, Marx & Ginter, 900 Traction Building, Cincinnati, Ohio,

and

FRANK ZUGELTER, and GERALD B. TJOFLAT of Zugelter & Zugelter, First National Bank Bldg., Cincinnati, Ohio.

*For Defendant,*

WARREN C. HORTON of Hinkle, Horton, Ahlberg, Hansmann & Wupper, Chicago, Ill.,

and

EARL FREEMAN of Freeman and Freeman, Chicago, Ill.,

and

T. A. HERRON of Wood, Avery, Herron & Evans, Carew Tower, Cincinnati, Ohio.

* * * * * *

### Nathan Kaplan

was called as a witness and having been first duly sworn, was examined and testified as follows:

### CROSS EXAMINATION

By Judge Marx:

Q. State your full name. A. Nathan Kaplan.

Q. Where do you live, Mr. Kaplan? A. 1717 Catalina Avenue, Bond Hill.

Q. That's a suburb of Cincinnati, Ohio. Now, what is your business? A. Secretary and Treasurer of Squires.

Q. What's the full name of Squires? A. Squires, Inc.

Q. That's the defendant in this case? A. Yes sir.

Q. And you are the Secretary and Treasurer? A. Yes sir.

Q. Now this examination is by way of Cross Examination. How long have you been Secretary and Treasurer? A. Since incorporation was started, September 25, 1940.

Q. Is that an Ohio corporation? A. It is.

Q. What is your business, describe your business. A. Selling men's clothing and furnishings.

Q. Does that include the sale of men's shirts? A. It does.

Q. What kind of shirts? A. All kinds of shirts. Dress, sport shirts.

Q. Does it include the sale of women's shirts, too, blouses? A. We don't carry anything in the women's line.

Q. Did you at any time carry a shirt manufactured by the Spectator Company in Chicago? A. Yes sir.

Q. I'll show you a shirt in a box, this is your box, isn't it? A. It is.

Q. I ask you if the shirt which I now show you, known as Corsair, by Spectator, is the shirt that was bought by your company from the Spectator Manufacturing Company in Chicago and sold by you? A. Yes sir.

Q. I'll ask you to produce here your correspondence and purchase and sales from the Spectator, with the Spectator Manufacturing Company, concerning this Corsair shirt, which we might offer here as an exhibit.

* * * * * * *

(Plaintiff's Exhibit No. 1, witness Kaplan, was marked for identification and received in evidence.)

Q. I was asking you about your purchases, sales orders slips and correspondence, do you have those with you? A. I have those with me.

Q. I will ask you to produce those. A. I have the purchases but I don't have the sales.

Q. You don't keep a record of sales? A. We don't keep separate sales.

Q. Do you have any record of sales at all? A. We don't keep any records of sales.

Q. Will these slips which you have produced show how much you bought from the Spectator Company? A. That is true.

Q. Did you sell all that you bought? A. There are about two or three left.

Q. With the exception of the two or three that are left you have sold them all? A. We have.

Q. Did you sell them in the City of Cincinnati? A. We have.

Judge Marx: Now I'll offer in evidence the purchase orders produced by the witness.

(Plaintiff's Exhibit No. 2, witness Kaplan, were marked for identification.)

By Judge Marx:

Q. These are invoices sent to you by Spectator Sportswear? A. It is.

Judge Druffel: Well that could be stipulated couldn't it later on?

Mr. Horton: Your Honor, I want to make this observation, I don't know why all these are to be brought in the record as a matter of damages.

Judge Marx: They are not at this time directed to the matter of damages.

Mr. Horton: And if they are directed to the matter of this company having sold these shirts why we would stipulate that they sold these shirts.

Judge Marx: Well these are invoices 6256, 6271, 6433, 66——

Judge Druffel: It's not necessary to go into that, it just takes up time. The point about it is that you can calculate that in recess and stipulate that they bought and sold so many shirts.

By Judge Marx:

Q. Now you have correspondence with the Spectator Sportswear Company concerning these purchases? A. I have some.

Mr. Horton: I object to that as being irrelevant and immaterial to any condition in this case. I don't know what relevancy it has if it will be stipulated that they bought so many——

Judge Marx: It has nothing to do with that at all, it has to do with the patent situation.

Mr. Horton: There is no charge of unfair competition or anything of that character in this case, and Spectator is not a party defendant.

Judge Marx: Well, maybe they should be a party defendant, and that's why we want to see the correspondence.

Mr. Horton: That has no relevancy in the issue of this case.

Judge Marx: Well it bears upon the control of this litigation, if Your Honor please.

Judge Druffel: Well do you want to make the Spectator a defendant at this time?

Judge Marx: We may if the facts are as we believe them to be.

Mr. Horton: Spectator is not within this jurisdiction.

Judge Marx: Well we'll present the law on that after we get the facts. The facts as to the defense of this case are relevant, as I understand the law.

Judge Druffel: I thought that all such matters would be all worked out in advance and that we were simply going into the issue of the validity or the invalidity, and infringement of this patent. I think that, just to keep the record straight, you have a burden here of proving infringement, and I think we want to narrow the issues as much as possible, and let's proceed on that. The other matter can follow later, but the burden is on the plaintiff to establish——

Judge Marx: May we examine this correspondence which may obviate the situation, or shorten it?

Judge Druffel: Well do you want to recess at this time. Is there any objection to the examination?

Mr. Horton: I have no objection to him examining them.

Judge Druffel: Well we will recess and give you a chance to examine them.

(Short recess.)

Judge Marx: We got a little out of the correspondence that we want but we thought we might ask this witness a question and then withdraw him from the stand and go on with the rest of the case as Your Honor suggested, and probably pick this up later.

Judge Druffel: I just want to give you this, that we recently had this same question raised in a very important patent case and the subject was postponed altogether until the question of the validity was determined, because unless that is settled the other is all incidental and unimportant anyhow.

Judge Marx: Yes, I know, but the correspondence we think we want we thought he might get, that's the reason I wanted to ask him now if there is any, maybe there isn't.

By Judge Marx:

Q. Did you have any correspondence in relation to indemnity given to you by Spectator Sportswear Company,

or to their defense of this patent litigation? A. Our attorney, Mr. Burns, has some privileged mail, correspondence.

Q. Well that's the correspondence we want you to bring and we'll ask that you bring it. Then the court can determine later when the proper times come whether it's privileged or relevant. So will you produce it here in the court room later on? A. Yes sir. Later on in the case I will.

Mr. Horton: Well are we to understand that this is correspondence that you have, or what is it?

The Witness: Mr. Burns, our attorney has it. He evidently has corresponded with Mr. Aaron, of Spectator's office. I have never seen it.

Mr. Horton: Well it is Mr. Burns that has the correspondence?

The Witness: Yes sir, Mr. Burns.

Judge Marx: Will you obtain it from your attorney, or have your attorney here, one or the other, and at the proper time we will arrange the time with you, whenever the Court says it's all right?

The Witness: Yes sir.

(Witness excused temporarily.)

Judge Marx: We'll call Mr. Brohard.

Whereupon,

**Montie M. Brohard, Jr.,**

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Judge Marx:

Q. Mr. Brohard, will you state your full name? A. My full name is Montie Menola Brohard, Jr.

Q. Where do you live? A. 2526 Indian Mound Avenue, in Norwood.

Q. That's Hamilton County, Ohio? A. Correct.

Q. Are you married? A. Yes sir.

Q. And what is your business? A. I'm a shirt manufacturer.

Q. When did you first become a shirt manufacturer? A. I started in the shirt business when I was twelve years old, I don't know when you could exactly say that I became a shirt manufacturer.

Q. Well that's what I wanted to get is when you, with what company you became associated. A. At the age of twelve I became associated with my father, just as a clerk and a sweeper. I worked odd times.

Judge Druffel: We don't want that, that's not necessary. By Judge Marx:

Q. What's the name of your father's company? A. The Brohard-Rainer Shirt Corporation.

Q. Where are they located? A. 424 E. Fourth Street, Cincinnati, Ohio.

Q. And what type of business are they in? A. They make made-to-measure shirts exclusively, except during the war they made Army Officers' shirts.

Q. Are you the inventor of this shirt known here under the name of Tailspin, I believe, and covered by the patents that I referred to in the opening statement this morning? A. I am.

Q. I'll show you the patent, the Design patent, No. 146895 and ask you if that is the, one of the patents of which you are the owner and inventor. A. It is.

Judge Marx: I'll offer this patent in evidence. That will be exhibit 3.

(Plaintiff's Exhibit No. 3, witness Brohard, was marked for identification and received in evidence.)

By Judge Marx:

Q. I'll show you patent No. 2428198, and ask you if that is the other patent, of which you are the owner and inventor. A. It is.

Judge Marx: I'll offer that in evidence as Exhibit number 4.

(Plaintiff's Exhibit No. 4, witness Brohard, was marked for identification and received in evidence.)

By Judge Marx:

Q. Will you describe how you first came to think about this invention. A. I took up flying as a hobby in 1941, and I became very engrossed in this hobby and it naturally stimulated my thinking, inasmuch as I was in the shirt manufacturing business, it stimulated my thinking in that direction. I can't remember at exactly what time but after I began flying I began to realize the need for a special shirt for flying, or at least a shirt appropriate for wear around airport and airplanes. It was not 'til early 1944 that my ideas became crystallized upon a particular shirt, now known as Tailspin.

Q. Did you make and sell that shirt in 1944? A. Yes sir.

Q. Where did you manufacture it and where did you sell it? A. It was originally manufactured by the Brohard-Rainer Shirt Corporation and my original sales were in New York City to Saks Fifth Avenue, Abercrombie & Fitch, and a number of other stores throughout the United States, whose local buyers came to see my original display at the Park Central Hotel.

Q. In New York City? A. In New York City.

Q. Now can you take the shirt and describe it, as to its, both its appearance and utility? And also I'd like to ask you preliminarily, in the Brohard-Rainer Shirt Company did you have different designs of sports shirts, and other

shirts then on the market? A. Yes sir, at the time the Tailspin was brought out we were making not only made-to-measure dress shirts, but also shirts of a conventional nature that had already been displayed, which are known to the trade as the in-and-outer style of conventional sport shirt, in addition to a style known to the trade as a gambler's style, or western style shirt. I forget the first part of your question——

Q. Well, what I meant to ask you is whether you had patterns and designs in the Brohard-Rainer Company of all kinds of different shirts. And how that came about. A. Well the Brohard-Rainer Manufacturing Corporation, being a manufacturer of custom-made shirts were frequently called upon to duplicate shirts that their customers brought in from all over the United States, as well as all over the world, and if they had one pattern of shirt they have maybe fifteen hundred patterns, many of them of which are very peculiar. It was with this background that I was able to create the entirely different and unique Tailspin shirt.

Q. Now what is the——

Mr. Horton: I move to strike the last part of the statement as a conclusion of the witness.

Judge Druffel: That is a matter for the Court's determination.

By Judge Marx:

Q. Now can you take the shirt and show wherein it is, what its features are and wherein it is unique or different? I think you have one on. A. The first thing that is different about this shirt is that it is streamlined, if you imagine the human body as a projectile, going in this direction or this direction, this goes with the flow of the wind. Secondly, with my coat on as you have just seen it, I offer the perfectly plain bib front, with no seams or

stitches or pleats. The shirt can be worn either in the trousers as I have worn them or out of the trousers as Judge Marx has demonstrated, it can be worn either with a tie or without a tie, without a tie at all it presents an unusual appearance. When the shirt is completely closed there is no billowing of the shirt such as you experience in the conventional shirt, when you get into the propwash or the big winds that blow over an airport; secondly when the shirt is zipped, say to here, to afford an adequate degree of comfort if a wind should come up or you should step into prop blast, it blows the shirt shut instead of blowing wind down your chest. If you zip it even to here the shirt will automatically close and the wind will drop——

Q. Well just describe how it is designed, so that the zipper is not seen when the coat is worn. A. Well in order to keep the zipper from being seen when the coat is worn, the zipper cannot start at the conventional center of the garment, it must start underneath the collar point to either the right or the left.

Q. And what are the features which cause the shirt to be blown shut in the wind, when partly zipped open? A. Well I would best describe that feature as being comparable to the swing valve action on a steam line trap which permits the live steam to go through but when the cold water starts to back up the swing valve closes and prevents the cold water from getting back into the hot live line.

Q. What additional protection does your shirt afford to the body of the wearer as distinguished from the conventional shirt which existed previously? A. The additional protection comes through the fact that without the conventional opening in the front of the shirt the wind cannot get in to the front of the body, and secondly with this type of construction at the neck, the wind cannot possibly hit

the upper chest and lower throat area, because of the construction. Any other shirt, there's only a button there and then there's a three-and-a-half to four inch gap before the next one comes in, well that gap is where the wind goes through. There are no such gaps in the Tailspin shirt.

Q. What is the, have you made any actual temperature tests to determine the differences between your patented shirt and other shirts?

Mr. Horton: I object to the testimony on any ex parte tests that he made.

Judge Druffel: You mean body temperature, or what do you mean?

Judge Marx: Yes.

Judge Druffel: We may proceed. He may give it. You did say you made some tests——

The Witness: Yes sir.

Judge Druffel: Now what's the next question?

By Judge Marx:

Q. Describe what tests you made and what the results showed? A. My tests include the lumber jacket with the zipper in front, and the conventional blue gabardine sport shirt that you have shown in the court so far and the Tailspin shirt of the same material as the conventional shirt. I sat in front of a large electric fan which was placed about a foot or a foot-and-a-half from my chest, then I took a large photographer's thermometer and attached some cotton fabric to the end of this thermometer, previously having painted a circle on my chest, so that the theremometer would always be placed in the same spot, I put this thermometer in water so as to create a wet bulb situation, and then placed the thermometer on this spot on my chest and tested each of the three garments for thirty seconds, with the fan at the forty-five degree angle from the left, and

then dead center and then forty-five degree angle on the right. And all of the tests the Tailspin shirt was warmer. Naturally in some the degree of difference in warmth was not as great as in others.

Q. Have you made any tests as to the, whether or not the flap of the shirt when zipped partially open will blow closed. A. Yes sir. Due to the construction of this shirt when the fan is at a 45 degree angle from the left this shirt is absolutely closed. When the fan is directed dead center against the shirt the flap still remains closed. When the fan is put at the forty five degree angle from the right, even though the shirt is open, even though the zipper is open three or four inches below the collar point, exposing an open portion of the zipper, the shirt still remains closed due to the constructive protection of the origination of the zipper opening underneath the collar.

Q. Is there any flap that closes across underneath the zipper? A. There is a protective flap underneath the zipper.

Q. Can you show that to the court, either you can take your own tie off—— A. I don't have to take my tie off, that's another feature, there's the underlying flap.

Judge Druffel: I see.

By Judge Marx:

Q. Does the zipper extend all the way down from the neckband under the collar to the bottom hem of the garment or does it stop at some given point? A. No it does not, it extends only to a point about an inch-and-a-half to two inches below the belt line, and from there on it's open to get, give free access to the swinging of the hips.

Q. I want to direct your attention to how the trade in the selling—oh, there's one thing I didn't ask you about—what about the adaptability of the garment for women as

well as men? A. It's perfectly adaptable for women's wear. It is one of the first garments, I might say that has an asexual opening, in other words both garments open on the same side, contrary to the conventional method of having women's garments open on the opposite side from men's.

Q. Is it convenient or possible to have someone model, some woman, I believe your wife is here, could she model one of those shirts for women? A. Yes sir.

Mr. Horton: If Your Honor please, I think it is going far afield, I think there is no charge that the defendant in this case sold any shirts for women.

Judge Druffel: Well we have the statement in the record that they are readily adaptable for women as well as men. I think that's sufficient for the purpose. Are you going to put in any figures showing the number sold for women's wear, or do you have them?

Judge Marx: Well we are going to show the acceptance of it in the trade for both men and women.

Judge Druffel: Well that's all right. That's sufficient for the purpose.

Judge Marx: I'm coming to that now so that's the reason for this book in the witness' lap.

By Judge Marx:

Q. Will you describe when the shirt was brought out and then follow through the advertising and the acceptance of the shirt by the general trade dealing in the sale of men and women's shirts.

Judge Marx: I wonder if, Your Honor, it's a large book, and——

Judge Druffel: Well if you'll stand down there in front of there and I'll step down and——

Judge Marx: That's what I thought, Your Honor.

Mr. Horton: If this is going to be a lot of clippings, or newspaper clippings why of course I am going to object, your Honor. I don't know what it is yet.

Judge Druffel: Well I don't know what it is either, but first this may be the product of your own advertising agency.

The Witness: No that is exactly what it is not.

Judge Marx: That's the reason for our putting it in.

Mr. Horton: Well if it is put out by somebody else and they are not here for cross examination why I object to it.

Judge Marx: I'll let the witness state what it is first and then I'll argue with it.

The Witness: Just as soon as my initial offering was made in the Park Central Hotel, New York City, these publicity things began to come out on their own volition.

Mr. Horton: That's what I object to, Your Honor, I, the witness was going to tell us what this book was first, I thought.

The Witness: This is my scrapbook of the chronological story of my business.

Mr. Horton: Clippings taken from newspapers and magazines?

The Witness: Yes sir.

Mr. Horton: Prepared by you or by someone else?

The Witness: No the clippings were not prepared by me.

Mr. Horton: Note my objection.

The Witness: But the book was prepared by me.

Judge Marx: Well that's the very point was to show that this was so novel and unique that the advertisers all over America of their own volition picked it up and advertised it as unique without his having to do any advertising.

Mr. Horton: Your Honor——

Judge Druffel: Well, is this your ad?

The Witness: This particular ad is my ad, yes sir.

Judge Druffel: Well will it be admitted here that in connection with the ad they are entitled to so much free publicity.

The Witness: No, I don't think that I will admit that because I have seen other garments introduced that did not achieve near the amount of free publicity that this one did.

Judge Druffel: Well I'll tell you what I'd do about it, we have to meet this thing somewhere, I'd sustain the objection and let you tender this as what you would show if you are allowed to show it and then we will have it in the record just the same.

Now do you want to have it marked so that we will get to that?

Judge Marx: Yes.

(Plaintiff's Exhibit No. 5, witness Brohard, was marked for identification.)

Judge Marx: Well with reference to the offer, if Your Honor please, it's somewhat difficult, the book does contain several ads that were prepared or published or printed by Cavu Clothes or by the witness, but a large part of it is made up of publications from Coast to Coast, of persons that have no connections with it whatsoever. Of some that were even not commercial, I mean there is, will appear here, we have a stipulation on it, and I can read that either now or later.

Judge Druffel: What kind of a stipulation?

Judge Marx: Well I'll put it in now and then Your Honor will see what else there is in the book of a similar nature. We'll offer in evidence at this time the following stipulation.

Mr. Horton: I agree to the facts as set forth in this stipulation, and I have signed it, but I object to it as being irrelevant and immaterial, as the opinion of some designer——

Judge Druffel: Well it was the stipulation by agreement and if you want to put it in why——

Mr. Horton: No, I stipulated at the time I would agree to the facts, but I reserve the right to object.

Judge Druffel: Well does the agreement relate to this book?

Mr. Horton: Not this book, no sir.

Judge Marx: It relates to some of the exhibits in this book, yes sir.

Mr. Horton: It relates to another book.

Judge Marx: I see no reservation of the right to object to the stipulation here.

Judge Druffel: All right, let's go ahead.

Judge Marx: It's a stip—it's entitled in this cause headed Stipulation: It is stipulated by and between counsel for within plaintiffs and defendant, that if Bernard Rudofsky of New York were called by plaintiffs as a witness to testify in the above entitled cause he would testify as follows: (1) That he is Director of Apparel Research, the Museum of Modern Art, 11 West 53rd Street, New York City, New York. (2) That he was born and educated in Austria where he received degrees in Engineering and Architecture, that he holds as well a Degree of Doctor of Philosophy, that he has traveled and lived for years in various countries and has engaged in studies of many subjects, including art, that he maintained architect offices for five years in Italy and for three years in Brazil and that he has been a resident of New York City, New York, since 1941. (3) Since taking up residence in New York within a period of three years the Museum of Modern Art in New York showed his work three times, this as industrial designer and a winner of Inter-American design competition, as Brazilian architect in "Brazil Builds," and as

creator and director of the Exhibit "Are Clothes Modern," held at the Museum of Modern Art in New York for an extended period commencing on November 28, 1944. That he has been editor and Art Director in Italy and twice in this country, the United States of America. That he has designed exhibition stage sets, furniture and apparel. (4) He is the author of the book entitled "Are Clothes Modern" which was published by Paul Theobald of Chicago, Illinois in 1947. The book having been printed in the U. S. A. by Poole Brothers, Inc. exhibits 2, 3, 4 and 5, hereto annexed, are photostatic copies of the title page, and pages 126, 127 and 198 thereof.

(5) That he has seen advertised at page 107 of the magazine "Apparel Arts" for July, 1944, a photograph of a gabardine shirt identified by the name Tailspin, reported to be manufactured by Cavu Clothes of Cincinnati, Ohio. That the shirt illustrated in that magazine appealed to him as a type of garment that he wished to exhibit in the exhibition he was preparing for the Museum of Modern Art in New York City. He therefore wrote a letter on July 24, 1944, to Cavu Clothes, Transportation Building, Cincinnati, Ohio, requesting a photograph of the Tailspin gabardine shirt pictured in Apparel Arts magazine of July, 1944, on page 107. This letter was replied to by M. M. Brohard, Jr., of Cavu Clothes on July 27, 1944, in which he, Rudofsky was asked what he intended to use the photograph for. This was explained in his, Rudofsky's reply of August 1, 1944, to which reply was made by M. M. Brohard, Jr., on August 24, 1944.

The Brohard letter of August 24, 1944, was answered by said Rudofsky on September 5, 1944, and plaintiff's exhibits 6, 7, 8, 9 and 10, annexed hereto, are photostatic copies of an exchange of letters between said Rudofsky

and said Cavu Clothes, Inc., and M. M. Brohard, Jr., of Cavu Clothes, Inc., of Cincinnati, Ohio, respectively.

(6) That the photograph shown on Exhibit 4 hereof, was produced from a photograph obtained from Montie M. Brohard, Jr., of Cincinnati, Ohio, at his, Bernard Rudofsky's request, first made by him by letter, exhibit 6, hereof.

(7) That the statements which he made in his book "Are Clothes Modern" at page 127, including the italicized statement appearing at the top of page 127, exhibit 4 hereof, were composed by him and represent his own views of the subject matter there expressed. The statements made in the first paragraph on page 198 concerning garments modeled from the simplest of geographical patterns, like rectangles or triangles, had reference to garments to the type illustrated on page 127 of his said book." And that's signed by all counsel.

Now the exhibits are two, Bernard Rudofsky's "Are Clothes Modern," an essay on contemporary apparel. Then Exhibit 3, "from the Editor of a service," is an excerpt from the book, "the Editor of a Serviceman's magazine received many thousands of letters from dissatisfied men. Analyzing their claims, it appeared that the sailor's uniform excelled all others in compliance with the pocket and button ceremonial. If pockets are mainly ornamental——

Judge Druffel: Well that don't help this situation does it?

Judge Marx: Well we get, I'm looking for this point here: "The slide fastener still in its teens, and sometimes awkward is of singular interest for it might put an end to an age old custom born from superstition: the distinction between the male and female clothing by buttoning right and left. There is no doubt as to the dual character of present day clothes."

Then follows, if Your Honor will look here in the article: "This shirt is remarkable for its departure from the archaic system of male and female garments as distinguished by buttoning right and left."

Mr. Horton: Is that a part of that book?

Judge Marx: This correspondence is in this book.

Mr. Horton: May I take a look at it.

Judge Marx: Here. There's a page here devoted to it.

Judge Druffel: Well might I suggest that we have another matter and then at recess at twelve o'clock for a few minutes—that there may be certain parts that you'll admit in here as a fact, that's stipulated in there?

Mr. Horton: It's a duplication of——

Judge Marx: Well I might add that there are others——

Judge Druffel: No, but isn't it what you agreed to in the stipulation, without reference to this book?

Mr. Horton: I never saw this book before.

Judge Marx: Well let him have a look at it.

Our point, if the Court please, is that this Museum of Modern Art is not, I mean its a museum devoted to things that are modern and new and if they picked this thing out on their own volition, and they were not contacted by Cavu Clothes, and they chose it as being a typical exhibit of something new and different——

Mr. Horton: Well there is something——

Judge Druffel: Well do you want to in connection with your objection here, to test this witness as to what's really in here, on the basis of whether or not its hearsay or facts? Do you want to do that?

Mr. Horton: Yes, sir.

Judge Druffel: Well suppose you do that for the next ten minutes then.

## CROSS EXAMINATION

By Mr. Horton:

Q. Mr. Brohard, on this book that's been marked exhibit 5, I understood you to say that this was a notebook that you had made up of clippings which you had cut out of magazines and newspapers. Now is that true? A. It is largely clippings from magazines and newspapers, although it contains other things, such as photographs of my business, correspondence.

Q. Well here's a photograph of your plane. A. Right.

Q. And a picture of you. A. Right.

Q. And then some clippings from magazines. A. That's right.

Q. Now you didn't prepare those articles that are on that page? A. I did not.

Q. And the people who did prepare them aren't here are they? A. No.

Q. And on the next page there again are clippings from newspaper advertisements are they not? A. These are clipping, advertisements that appeared including our garments.

Q. Well is there any one of those advertisements that you made up? A. Ah——

Q. I mean on this page. A. Not on that page, no, sir.

Q. That's entirely other people? A. Right.

Q. Now on the next page.

Judge Marx: Ah, just a moment, if Your Honor please, that is for the Court to decide but that's the very point we have in mind, that they show the popular acceptance and other people were so impressed with the novelty of it that at their own expense they advertised it to the trade, as a unique and novel and different and stimulating and exciting shirt, of a new variety for men and women.

Mr. Horton: Well how can anybody say that that was their reason unless they were here to testify about it?

Judge Marx: They published it to the world.

Judge Druffel: Well the point is that to be binding the counsel has a right to cross examine, and he has no opportunity here, now he's testing the witness to see whether or not this exhibit is relevant.

Judge Marx: I don't object to that, I'm merely pointing out, Your Honor, that the reason that he brings out here is the very reason that we claim it's relevant and competent.

Mr. Horton: Of that nature why I think there's no question about it.

By Mr. Horton:

Q. Now on this next page there are some letters, to you, aren't they? A. Yes, sir.

Q. And the people who wrote those letters aren't here are they? A. No, sir.

Q. Now here you have an ad that was put out by Cavu Clothes? A. Right.

Q. You have those ads available? A. That's the first ad we ever put out.

Mr. Horton: Quite possibly their ad might be admissible for some reason.

By Mr. Horton:

Q. On this next page, that again is something that's made up by someone other than you, is it not? A. The advertisement is somebody else's, the picture is ours, and this comment at the bottom is mine.

Q. Well that's the comment which you made up to put into your notebook? A. The plaintiff's yes.

Q. Now this next one you've got the correspondence with—what was his name?

Judge Marx: Rudofsky.

Q. Rudofsky? A. Rudofsky, umhuh.

Q. Now that's in the stipulation, isn't it? A. I don't know about the stipulation.

Q. All that correspondence is in the stipulation. The other is correspondence from other people—— A. To me.

Q. So called testimonials? A. Yes.

Q. And they're not here? A. Not here.

Q. Same is true in the next two pages, is it not that these are things prepared by other people who are not present? A. This is a letter from Pan American Airways, a letter from their advertising promotion manager.

Q. Is he here? A. No, sir.

Q. He didn't—— A. No, sir, it came on his own violition. He requested——

Mr. Horton: I'd like to strike the answer as not responsive but just answer my question.

By Mr. Horton:

Q. He isn't here? A. No.

Q. You didn't prepare it? A. No.

Q. Now on this next page, the material on these two pages are again clippings prepared by other people that you didn't have anything to do with the preparation? A. I had to do with some of these photographs.

Q. Which ones? A. Well I participated in helping all of them be taken, as a matter of fact——

Q. Do you have those photographs? A. This is one of them.

Judge Druffel: Well those were all primarily for publicity purposes, weren't they?

The Witness: Sir, I cooperated with the Bonwit Teller Store in New York in setting up this promotion, having this helicopter put on the third floor of their store, but

what part I am responsible for and what they're responsible for——

Judge Druffel: Well I mean is it sales promotion straight through?

The Witness: Yes, sir, the first time that clothing has been promoted with an aviation item.

By Mr. Horton: Well——

Q. Well isn't that true of this whole notebook, isn't it made up of clippings, letters, publicity items, in connection with advertising campaigns or promotion? A. Not necessarily, no.

Q. Or letters from people who are not present? A. Ummmm, no I wouldn't say so, I think you'd better interrogate me on each.

Q. All right, next two pages, now that is all material prepared by third persons, third parties who are not here, isn't it? A. Its true, for instance this is not a publicity article.

Q. Well whatever it is you didn't prepare it did you? A. No, sir. I prepared this one.

Q. Which one? A. The one that our plane and our pilots were offered when they had a flood down here in Kentucky, to take medicine and food into Kentucky.

Q. All right it says, "Free plane service has been offered by Cavu Clothes of Cincinnati to any person or organization or business firm faced with the necessity of making emergency shipment or emergency delivery into any area isolated by flood waters?" A. Right.

Q. The company has a three passenger plane and commercial pilot, Phone Main 1890? A. Right.

Q. Is that all of it?

Now these next two pages, those are photographs which you had taken, are they? A. We took ourselves too,

so that I could have a picture story here of how we sold our shirts.

Q. And you have those photographs available do you not? A. Right here.

Q. I don't see how they could be relevant but maybe they are.

Judge Druffel: More or less a pictorial picture of the effort to stimulate sales and introduce your Cavu shirt to the public.

The Witness: Let me correct this to this extent, it is not the pictorial story of our efforts to increase our sales; it's a pictorial story of the chronology of my business.

Judge Druffel: All right, we'll take your version of it, that's all right.

The Witness: Right. It is not all promotional that's in here, I wanted a record, a history of some of the invisible men that were with us because they had war records and what not, and it has that.

By Mr. Horton:

Q. Well what you have at the top of this page is: "Cavu puts planes into practical every-day use, for traveling and for publicity, more potent than we ever dreamed? A. Right.

Q. That's true? A. Right.

Judge Druffel: Well I'll tell you I think we've gone far enough there, suppose we recess at this point and let Judge Marx dictate for the record what this witness would testify in relation to this book so you'll have the whole story in the record. Any objection? We'll recess then for a few minutes?

(Short recess)

Judge Marx: We offer in evidence Plaintiff's Exhibit 5, both in its entirety, and we offer each of the several

exhibits separately. We offer in evidence Plaintiff's Exhibit 5, being a book containing a number of pages, we offer it in its entirety and we offer each exhibit contained therein separate, on the ground that it contains the pictorial history of the publicity and general acceptance by the trade of the patented shirts involved in this case, and contains also the communications which were received in the regular course of business by the inventor, and are evidence in graphic form of the reception and general reaction of merchants handling the shirt to the patented shirt. At the first page opposite the picture of the inventor entitled "All free publicity," we expect to prove that, if permitted, was publicity which appeared in the publications named on the page and was printed at the expense of other persons than the inventor, expressing their reaction to the patented shirt. Same is true of the other side of the second page, excerpt from the articles in Esquire and from Brooks and from Pogue's.

* * * * * *

Judge Marx: The next page the article headed: "Our Own First and Only Trade Magazine Ad as Published by Cavu Clothes." And is offered separately as a publication which the witness can testify to appeared in—what magazine did this appear in?

The Witness: I think that appeared in Men's Wear magazine.

Judge Marx: In Men's Wear Magazine. The Letters from Lewis and Thomas Saltz & Company, we expect to prove, if permitted were from the leading men's furnishing store of Washington, D. C. and letter from John L. Ash, Ft. Worth, Texas is from a leading men's furnishing goods store there and letter from Jenny, in Cincinnati, with a request that, for the manufacture of women's shirts,

Jenny's being a leading women's apparel store, and all of these letters are offered in evidence as the spontaneous evidence of the acceptance of the article by the trade, and were received in the regular course of business by the inventor, that the page headed: "Really Super" by Dunlap Clothes Shop, containing a picture, the page being numbered 8 in lead pencil at the left hand corner, is offered as the public display and acceptance of the shirts within this jurisdiction, of the shirts in question. The letters at page 9 from the Museum of Modern Art, are covered in the stipulation but the page contains from Clarke's, merchant in Tulsa, Oklahoma, Joe Brandt, a leading merchant in Laredo, Texas, were received in the regular course of business and show again the public acceptance and popular approval of this shirt as unique and novel and utilitarian.

Page number 10 in lead pencil at the lefthand corner is of the same general character. Page 11, the article from Aviation magazine entitled "Hang your shirt on a star" is offered separately as a spontaneous reaction in the leading aviation publications edition. The balance of the page contains an invitation from Pan American Airways system to tie the use of the Cavu jacket to their activities, and is offered separately.

Page 12 and 13, are advertisements, articles, concerning the sale of shirts in connection with the helicopter display at Bonwit Teller in New York, which is offered as evidence of the first tie-in between aviation shirts and the sale of aviation planes.

Page 14, is a full page ad by Bonwit Teller, which appeared on the following Sunday in New York City, October 22, 1944. Page 15, is a letter from the President of Bonwit Teller received in the regular course of mail and a letter from the buyer of Bonwit Teller as to the commercial suc-

cess of the article received in the regular course of mail. And also an advertisement from the New Yorker, paid by Bonwit Teller Company.

The next two pages, 16 and 17, cover the sale of Cavu shirts by airplane and show the photograph of the airplane and how planes were used too, in the sale of the Cavu shirts.

Page 18, contains photographs of the combined sale of Cavu shirts and for airplanes, illustrating the tie-in between the shirt and aviation.

Page 19, are advertisements of Mandel Brothers in Chicago, covering the sale of the Cavu shirt, appearing on or about March 6, 1945.

Page 20, advertisements which appeared in Downtown Shopping News, February 19, 1945. And in Los Angeles at Bullock's Wilshire—is that a men's furnishing store——

The Witness: Yes, that's both I think.

Judge Marx (continuing): Both men's furnishings and general store; we offer separately house purchase order No. 4016, sent out by Amos Parrish & Co., Inc., 500 Fifth Avenue, New York 18, November 21, '45, together with accompanying letter as to the purpose of this shirt, which was to be used——talk louder.

The Witness: Into a Fashion Clinic. Their 36th Fashion Clinic. Amos Parrish are progenitors of high class, style, fashions.

Judge Marx (continuing): The balance of the page is also offered as containing additional ads and also part of the radio continuity used over the air by Schlemmer & Scott, 75 E. Wacker Drive, Chicago 1, for Mandel Brothers in connection with the sale of Cavu shirts.

On page 22, we offer separately the full four-color excerpts from Charm magazine printed at their own expense

covering the Tailspin shirt for women, showing a picture of a flying Navy nurse. I think we ought to offer this separately.

The balance of the page, 22, contains an ad by Newman Marcus, a men's shop in Dallas, Texas. Page 23 is offered separately, it is an advertisement by Walthan Desauller, Ft. Wayne, and also one from Block in Birmingham, Ala., and another advertisement from Walthan Desauller and a letter from Macy is not offered.

Page 23 contains a letter from the Metropolitan Company of Dayton, Ohio which is offered separately, dated November 28, 1945, which was received in the regular course of business and encloses a copy of the advertisment of Cavu clothes as published by the Metropolitan company which appears on the same page.

Page 25 contains advertisements published by Metropolitan in Dayton, the Fair Sportswear in Chicago, Schnolnicks' in Detroit and Peters in Birmingham, Alabama, and also a photograph taken by Charles Minn of King Cole the noted orchestra leader and pianist, wearing a Cavu shirt.

Page 26 is offered separately and contains advertisements which were published by Mandel Brothers in Chicago, Ill., Blachs in Birmingham, Alabama, Plotzfells in Kansas City, and Meyers, Lexington, Kentucky.

Page 27, contains advertisements of the Porter Clothing Company, Birmingham, Alabama, Fomby's San Antonio's largest exclusive men's store, and Kirby Block and Company in New York, isn't it, all being advertisements published by the companies concerned at their own expense descriptive of this shirt.

Page 28, advertisements by Berger's, Buffalo, New York, Moore's Tailoring and Men's Wear, Monroe, Louisiana,

Hagen Clothing in Natchitoches, Louisiana, also being advertisements published by the stores mentioned, in which the mat however, was furnished, however, by Cavu Clothes for these advertisements.

Mr. Slutz: On page 29 there appear advertisements from McLean Store in Binghamton, New York, from Larry's Store in Houston, Texas, oh, its Houston street in San Antonio, and there is an ad from Eilerman's in Covington, Kentucky, and there is reproduction of a commercial that was produced in a radio advertising program by the Fair Store of Chicago, and that radio advertising was done entirely at the expense of the Fair Store.

On page 30, there is an advertisement of the Henry Harris Company, at Cincinnati. There's a news item from the Daily News Record of Friday, December 6, 1946, referring to the sale of the Tailspin shirt in the John L. Ashe store of Ft. Worth. There is also on that page an advertisement that Cavu itself ran, Mr. Brohard believes in the Gold Book. That was an article run by the Pic magazine which listed a number of gift suggestions. Including among them was the Cavu style shirt.

On page 31 a reproduction from TWA Time Table, showing an ad by Bonwit Teller illustrating the Cavu shirt in the women's model known as the Tailspin De-icer.

Also on page 31 is a reproduction of an ad used by the General Tire and Rubber Company advertising their tires but illustrating a girl dressed in a Tailspin De-icer shirt, and this was done without any knowledge of Cavu and without any request by them. General Tire explained in a letter which is thereto attached that they used that product because they considered it tops in its field as General was in the tire business, and that they were using a picture of the latest idea that they could find. That advertisement

had a circulation in Time magazine, in Newsweek, in the American magazine, National Geographic, Saturday Evening Post, those magazines on that date having a total circulation of 9,104,243 copies. There is also an ad on page 31 from Marks Rothenberg Co., illustrating a modification of the Tailspin shirt know as Starliner, and there is also a letter from the Baskin Store of Chicago, Illinois, stating their reaction to the shirt, saying that they could have sold far more if they could have obtained the merchandise. That letter is dated December 28, 1946. In connection with the letter from Baskin we offer that separately and state that an officer of, or representative of the Baskin store will be present on the stand available for cross examination if desired.

On page 32 is a letter from Irby Thompson Company of Dallas, Texas. There is a mat that was issued by Cavu for use of its customers. There is illustrated, page 114 in the Apparel Arts, being a news item on effective promotions, and included in that is a demonstration, is a picture of a display window of the Rutland Store of Orlando, Florida.

On page 33 is a full page ad run by Cavu Clothes. On the same page is an ad of the Starliner shirt previously referred to by Irby Thompson, Dallas, Texas. There is on page 33 also a picture of a window display, featuring the Cavu Shirt, as displayed in the Commodore Men's Shop at the Commodore Hotel in New York City, together with a letter from the owner of that store stating that they had to have a special policeman to keep traffic away from the display, saying the more you ship the more we will sell.

On the unnumbered page which is the reverse of page 33, well I'll number it here now 34, is a Bonwit Teller ad of their white, showing the Cavu, well that's the Starliner

shirt with the matching Cavu slacks. Well they are referred to as Slanks. On the same page, number 34, is a full page news item from Printer's Ink, May 17, 1946, referring to Cavu and reprinting its ad, the ad in which air transportation was offered by Cavu. Similarly on that page is an ad by Leonard Hopkins Company, of some city in Alaska. On page 35——

The Witness: This is a picture story of the flying fashion show at the Bandara El Ranche in Bandara, Texas, in which six white garbardine Tailspin De-icers and six white gabardine slanks were sent to Stanley Marcus the President of Neiman Marcus store and he had professional models wear them at the show, at which show were displayed garments that were designed by the most famous designers in the country.

Mr. Slutz: Now many of the pictures on page 35 are taken from Life Magazine of May 26, 1947. These pictures were run by Life Magazine as news items, displaying new models and new types of clothes and featuring the Cavu De-icer, Tailspin De-icer shirt. Also on this page is the front cover of a magazine of the southwest known as Scene. The girl appearing in the picture on the cover is wearing the Cavu shirt and Slanks. On the same page is the letter of April 17, 1947 from Mr. Marcus of the Neiman Marcus company of Dallas, Texas, stating that the Tailspin Slank outfit made a tremendous hit, and was selected by the jury as the best flying outfit for the All American wardrobe, saying that they liked the outfit tremendously, and were much pleased with it.

On the same page, number 35, is an ad of Squibb's toothpaste, in which without any suggestion from Cavu the Squibb company used the picture of a man wearing a Cavu style shirt.

On page 36, is a page from the Aviation News magazine and a news item, and again showing a picture of the girl who appeared in the Neiman Marcus display, the Neiman Marcus ranch show which has been covered by Life Magazine.

On page 36 there is again an ad of the Baskin Company in Chicago, illustrating the Cavu shirt, also an ad of Bernard, Ltd., of Cincinnati, which appeared in the Holiday magazine. Now on that page there are two telegrams which were received by Cavu—the one from Floyd's, Inc., of Temple, Texas, which is offered separately, stating that they opened their new store that day and sold every Tailspin shirt in the store. There is another ad from Nevins, I mean another telegram, from a New York City store asking that they rush everything they could get.

On page 37, there is a copy of a page ad run in the Daily News Record of June 19, 1947 by Cavu, notifying the public that the patent, the design patent, had been granted and that a license had been given to the Mack Shirt Company to manufacture and sell such shirts. Also notifying all parties that Cavu intended to enforce its legal rights under this design patent. On the same page is a news item in the Cincinnati Enquirer, I believe, showing the winners of the National Air Races in the Thompson Trophy, and it appears that the pilot of the plane which won the trophy was wearing a Cavu style shirt.

On page 38, appears a full page copy of the ad run in the Daily News Record of Thursday, September 4, 1947, by the Mack Shirt company announcing the extension of the license in Marlboro, Baltimore, and there is a statement notifying all persons that use or sale of the infringing products would be prosecuted to the full extent of the patent laws.

On page 39 is a full page ad, in the Daily News Record of October 16, 1947, run by the Marlboro Shirt Company, announcing that they were now licenses by Cavu to sell the shirt and warning against infringements.

On page 40 is a full page ad, run in the Daily News Record of October 16, 1947, by the Mack Shirt Company, and Mr. Brohard will say that of his personal knowledge he knows that that ad did appear in that newspaper on that date, because he saw it.

On page 41, is a letter from Battelstein's store of Houston, Texas, expressing their appreciation for being able to sell the shirt and their confidence in it. There is on the same page an ad run by the Juilliard Company, one of the largest fabric manufacturers in the country, in which they show a picture of the Flightmaster shirt by Mack, styled by Cavu, in the new Juilliard Featheroy fabric, a type of corduroy. On the same page is an ad run by the Cavu company in the "This is Cincinnati" publications, a trade magazine. There is a picture of a display of the Thompson store in Lincoln, Nebraska, and it is a news article in which it is stated Mr. Thompson introduced the Cavu shirt to Lincoln, where it has gone over in a big way. There is also an ad of Bachrach's store—we do not offer the Bachrach ad at this time. There is also a copy of page 71 of the August 13, 1948 issue of Apparel Arts magazine, a news item, in which there is a picture of the Cavu style shirt and also a news column concerning new and unusual and different novelties that have been introduced. There is also a reference in that Article to the fact that the shirt was exhibited in the Art Museum of Modern Art. And there is also a statement as to the history, that it was developed by an air pilot who had himself found a need for this sort of shirt because of the propwash.

On page 42, is a copy of a full page ad from the Daily News Record of April 7, 1948, Wednesday, run by the Cavu Clothes Company, and Mr. Brohard would testify this was over his signature, and within his personal knowledge and is therefore separately offered. This is notice to the trade of the filing of some additional suits in Detroit and a claim against the Scallawag Shirt manufactured by Shirtcraft, and a statement that that is considered an infringement; also a reference to the suit in this court, and the shirt labeled Corsair by Spectator, and the claim that that is considered by Cavu as an infringement of patents. There is there similarly an announcement of licensed manufacturers, Mack Shirt, Marlboro and Cavu.

On page 43 is another full page ad, and which is separately offered and which appeared over the signature of Mr. Brohard as President of Cavu in the Daily News Record of May 23, 1948, again referring to the suits that had been brought and the additional case against the Richman Brothers Company in Detroit, filed on April 28, 1948.

On page 44, there is a two page ad run by Cavu in the Trade Magazine known as the Apparel Manufacturer. There is also and ad of Wallachs, which has many branch stores in greater New York City, picturing the Flightmaster sports shirt.

On page 45, is a two page double spread ad run by the Mack Shirt Corporation on the Flightmaster shirt in Men's Wear Magazine of June 25, 1948, and that is separately offered with the statement that Mr. Mack of the Mack Shirt Company will be in court and available for cross examination, if desired. There is on the same page, number 45, an ad run by the Pogue's Company, H. and S. Pogue Company of Cincinnati, illustrating the Spitfire shirt, made by Marlboro under the license arrangement.

Again there is an ad by Stix Baer & Fuller Company of St. Louis, illustrating the Tailspin Shirt.

On page 46, is a page from True Magazine of March, 1948 in which there is a four colored picture in connection with a fiction story. In that story, in that picture is illustrated a Cavu style shirt, and this was offered for the purpose of showing that illustrators and artists have seized upon this particular style as something new and attractive and unusual, and have used it in connection with illustrations of stories, without any initiative, or without any urging or prompting or suggestion by the Cavu company or any of its licensees.

On page 47 is another ad from the Pogue Company of Cincinnati, illustrating the Tailspin shirt by Cavu. A similar ad by Lyttons of Chicago. On the same page is a Wallach ad of Cavu sports shirts in the Kohinoor fabric, and an announcement of a news item to the effect that a Canadian license is being considered.

On page 48, is an ad run by Hemphill Wells Company, of Lubbock, Texas, also one by Shillito's of the Flightmaster shirt manufactured by the Mack Company. There is a copy of the letter from attorneys in New York City, Klein, Alexander & Cooper, addressed to Mr. Zugelter, the attorney for Cavu stating that the Manhattan Shirt Company is interested in a license under the patent.

On page 49, is a full page ad in, run by Blach's of Birmingham, in which they list their prominent and famous brands that they carry and among others they list Cavu. Pieced in on the same page is a four-color newspaper ad run by Blach's illustrating the Mack Flightmaster shirt.

On page 50, are a number of ads relating to a number of somewhat similar shirts, manufactured by other companies after the date of the patent. There is an ad of the McAlpin's Company, of Cincinnati——

Mr. Horton: I don't think that I understood——

Mr. Slutz: I say that on this page there are advertisements relating to shirts manufactured by companies other than Cavu, and that are not licensed and were made since the date of the patent. These relate to similar shirts but not licensed or patented. There is an ad of the McAlpin's Company of Cincinnati, two ads of that Company, of two different style shirts, one for men and one for women.

Similarly on page 51 there is an ad by the Brewster Shirt Company of New Haven, Conn., showing a shirt that they are offering which is similar to the Cavu style shirt. Again there is an ad of the LeRoy Shirt Company of Chicago and New York, showing a shirt that they have manufactured since the date of the patent and which is similar to, in appearance to the Cavu shirt. There is another ad on page 51, of McAlpins, relating to an unidentified shirt, which is not manufactured by Cavu or any of its licensees. And also one from the Pogue company.

On page 52 appears an ad of the Spectator Company relating to their Corsair shirt, the shirt that is in this case charged as being an infringement. On the same page is an ad of the Scallawag shirt which is in suit in a companion case to this and of the Frank & Ceder Company——

Mr. Horton: Not in this case.

Mr. Slutz: No not in this case. There is an ad of Casual Wear Shop of Chicago, Illinois, showing a women's shirt that is not one of the patented or licensed shirts but is similar in design. Again an ad of the Fair Store of Cincinnati, showing a somewhat modified design, which is not patented or licensed. There is, again there is a picture from the Daily News Record, its Daily News Record photo of a shirt produced by the Barney & Brooks Shirt Company, with a zipper closing, and a so-called Starlight shirt, presented by Carllyn's Shops of Chicago, Illinois.

On page 53, is an ad of the Rollman Company of Cincinnati relating to shirts styled by Mirador. And a further ad by Rollman's Company of Mirador shirts. There is another Fair Store ad, and one by the Rollman Company. On page 53 there is also an ad by Commar Zipper Company of Newark, N. J., who manufactures zippers. They published this ad in the Daily News Record of September 10, 1948 and in advertising their zippers they pictured a Cavu styled shirt.

On page 54, are two large pictures of the fashion show that was held in, Bandara, Texas, previously referred to. Similarly on 55 are three more pictures of the same girl modeling the Cavu shirt at the Fashion Show in Texas.

On page 56, is an ad of a new style shirt developed by the Cavu company, which is different from the one here in suit and that page is not offered.

On page 57 is a picture of a large ad run in the Cincinnati Enquirer, December 2, 1948 by the Mabley & Carew Company of Cincinnati, picturing the Tailspin shirt by Cavu and this ad is within the personal knowledge of Mr. Brohard, who saw it in the Cincinnati papers.

On page 58 are three mats furnished by Cavu to their various customers in connection with advertising of their shirts, two of the mats relating to the Tailspin shirt.

On 59 is an ad of the Metropolitan Company of Dayton which was carried in the Dayton Daily News of December 1, 1948, showing the Cavu De-icer shirt and the Cavu Slanks. There is also a larger picture of the Juilliard Company ad previously referred to showing the Flightmaster shirt by Mack, styled by Cavu in Julliard Featheroy, and that is the last page which is offered in this scrapbook.

Now Mr. Brohard will refer to some of the ads in addition to those that I have mentioned as to which he has personal knowledge, that is ads which he has seen in publications.

The Witness: And you want to refer to publicity items too?

Mr. Slutz: Yes.

The Witness: All right. I have seen all the publicity items and articles on page 5.

Mr. Horton: Are you going to go through that book now and say what you've seen?

The Witness: Yes.

Mr. Horton: Well leave me ask you this question, did you prepare it?

The Witness: Do you mean did I write the copy?

Mr. Horton: Yes.

The Witness: No.

Mr. Slutz: You say all those on page 5 you have personally seen in the publications?

The Witness: That's right, I've seen every item in here, on page 5.

Mr. Horton: Is this part of your offer of proof?

Mr. Slutz: That's right.

The Witness: I've seen only the Pogue ad and the excerpts from Esquire's on page 6. I saw all of the testimonial letters on page 7, I helped prepare our own ad appearing on page 7, I actually saw the Dunlap ad appearing on page 8 of this scrapbook. I saw all the original correspondence from Clarke's, Joe Brandt, of Laredo, Texas and the Museum of Modern Art appearing on page 9.

* * * * * *

. . . I saw the complete ad of the Dunlap Clothes Shop. I saw all of the correspondence from Clarke's, Joe Brandt, and the Museum of Modern Art——

Mr. Horton: Maybe I could shorten this up, Mr. Brohard, I don't deny that you may have seen an awful lot of this in newspapers and the correspondence you may have seen, and pictures you may have seen, my objection though is to the fact that you didn't prepare or write these items and therefore I can't cross examine you as to the statements made.

Mr. Slutz: Can I ask you this, Mr. Horton, as I understand it you are not denying that these ads actually did appear in the newspapers and the magazines that they purport to have appeared in? But the purpose of your objection is that you don't know who prepared the ad or prepared the news item——

Mr. Horton: What the purpose was or how they happened to do it or who paid for it——

Mr. Slutz: But your objection is not directed to, you are not raising any question as to whether they actually did appear?

Mr. Horton: No I'm not.

Mr. Slutz: In newspapers?

Mr. Horton: No I'm not. No I'm not.

Mr. Slutz: Then I think it will not be necessary for Mr. Brohard to identify those that he knows of his personal knowledge appeared.

Mr. Horton: No, I—have you finished?

Mr. Slutz: Yes I've——

Mr. Horton: I object to the form of the offer that it is replete with argument and conclusion, but I object to the material offered in so far as it purports to be clippings, or ads prepared by people other than Mr. Brohard, and they are not here for cross examination, I object to correspondence from third parties on that same ground, I object to large portions of it as describing and illustrating

in the ads, clippings, other products of Cavu than the shirt shown in the patents in suit, and I object to all of that portion of the exhibit which purports to show shirts manufactured by someone other than the defendant, and other than the plaintiff or those in privity with it.

* * * * * * *

AFTERNOON SESSION

2:30 p.m.

Judge Druffel: Have you completed your proffer?

Judge Marx: If the Court please, at the conclusion of our offer I understand that counsel on the other side made some concession with reference to certain parts of the proof, and I'd like to have that read to Your Honor and I haven't heard it myself as it was completed in my absence. I think it somewhat alters Your Honor's ruling.

(The objection of defendant's counsel was read.)

Judge Marx: As Your Honor has just heard that counsel does not object on the ground that these newspaper advertisements did not appear. In other words he concedes that either we can prove or he is willing to obviate the necessity for that proof that these particular advertisements did appear in these particular newspapers at the particular dates and were published by the persons who purport to advertise.

Judge Druffel: Well let's see if we can handle it this way, that the unobjectionable matter will speak for itself.

Mr. Horton: Of course while I might concede that they are genuine, which I have never denied or never knew anything about, the fact of the contents of the ad and the contents of the articles isn't proven by that because they say well it was prepared by you people unsolicited, they paid for it, they're not here, I can't cross examine them about that, nor can I cross examine them about the contents.

Judge Marx: Now as long as the authenticity is admitted, then I think that these advertisements, speaking first as to the advertisements are important and relevant as showing the popular acceptance and too, and also are relevant as bearing upon the novelty of the invention.

Judge Druffel: Well let me say what I've got in mind here—he's got written in there free publicity, free publicity.

Judge Marx: Well we don't offer that.

Judge Druffel: Well you're offering everything in the book, that's what my ruling goes to because we had the same thing in another patent case where they ran an ad in the newspaper and then the newspaper then gave them a nice write-up with an illustration of the device and so on, and it was admitted by counsel on both sides that when you buy an ad that you are entitled to free publicity, now he's got a lot of free publicity in there, now I don't see how that can be received as evidence because——

Judge Marx: No I think if Your Honor please, that is not our point, we don't want the offer to go to that. The fact is that we would expect to prove it, if permitted, that when this shirt was introduced, and of course he can testify to this, that they sold the shirt to various people all over the United States, and then these people were so impressed with the shirt that they of their own volition—he didn't give them any advertisements, or pay for any advertising, nor did he write the advertising. These people of their own volition wrote these advertisements, now that applies to people who were selling the shirt. But that isn't all, there were a lot of things contained in here which we call advertisements that are not what the public would call advertisements. For example Charm magazine, and I'd like Your Honor to see that, will you show that to the Judge,

Charm magazine of its own volition—here it is right here—Charm magazine of its own volition published a four-color print of this shirt as Your Honor sees there. In another place we have pasted the article from Aviation magazine, which did the same thing.

Mr. Horton: Of course that is precisely the point of the thing——

Judge Marx: Surely it's the point of it.

Mr. Horton: How do we know it was of their own volition?

Judge Marx: Well he will so testify.

Mr. Horton: Who will?

Judge Marx: Well Mr. Brohard.

Mr. Horton: Well Mr. Brohard doesn't know, he can't.

Judge Marx: Well he knows it wasn't of his volition.

Mr. Horton: That's something different.

Judge Marx: Well as far as he was concerned as the inventor he had nothing to do with it. And the same thing with this Museum of Modern Art, they wrote to him and said "We've seen your shirt someplace and we've awarded it, so to speak, a place in the Museum, on the ground that it is a unique and novel and new thing in both men and women's wearing apparel."

Mr. Horton: I don't think that's what said——

Judge Druffel: Well now I tell you——

Judge Marx: Well it says so in the article which hasn't been read.

Judge Druffel: It seems to me this is a kind of unusual way to prove your patent case, and I think the usual rule is that the utility is shown by the purchases and sales.

Judge Marx: We'll show that too, but——

Judge Druffel: Well——

Judge Marx: I mean we've just approached, happened to back into it so to speak this way, and I want to call Your

Honor's attention to a rather well-known case here, it was a suit brought for the Wright Company, Wright Brothers against Herron Curtiss Company and reported in 177 Federal Reporter 259, and in which the Court refers to the fact they say the newspapers of the country herald it as marvelous the success of the patentees published wide that human flight had been made possible, public recognition of their success was subsequently made by scientific institutes, medals were presented, such testimonial (and they call it testimonials and that's what some of these things are) are entitled to weight in support of presumption of validity and the practical utility. Citing cases. Now let's assume just to illustrate my argument that the opposite appeared here, that the letters which they received in the regular course of business from people who have seen these things and began to order them, and who commented upon them, had said "We've received a sample of your shirt, we see no novelty, we placed it on sale and it wouldn't sell, and therefore we're returning the dozen or so shirts that we've sent." Of course that would tend to show, there was neither novelty, nor utility nor popular acceptance.

Judge Druffel: I don't think so at all, that would show that that was that one man's opinion.

Judge Marx: Yes but if that was nationwide.

Judge Druffel: Nationwide they wouldn't be in court, they wouldn't have anything to sell, they'd be bankrupt.

Judge Marx: It might be, but that isn't the case. Of course I put it the other way just to illustrate the difference. Here was nationwide popular acceptance.

Judge Druffel: Well what I'm trying to do here, here you bring this whole scrap book in, and as it is there I can't——

Judge Marx: Well I think Your Honor it will have to be corrected in that respect, but, I mean we'll have to pick it out, I was trying to shortcut it.

Judge Druffel: Well if you could have worked out with counsel some arrangement that you could stipulate by illustration something that's symbolic or typical of what you expect to prove and then agree to that it will go in that way, but the book as a whole I have to sustain the objection to it.

Judge Marx: Well now I wonder, we have a witness here from Chicago, and if we could hold him over, If Your Honor please, and I'd like to put him on because we can't hold the others over.

Judge Druffel: All right let's have him. No objection?

Mr. Horton: No objection.

Whereupon,

**James Guy Alderson, Jr.,**

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Judge Marx:

Q. Now will you state your full name? A. James Guy Alderson, Jr.

Q. How do you spell your last name? A. A l d e r s o n.

Q. Where do you live? A. 5501 North Paulina Street, Chicago, Ill.

Q. And how old are you? A. 43.

Q. What has your business been? A. I am a salesman and have been a salesman for practically all my working years.

Q. In what business. A. In the shirt business.

Q. Where did you begin your business? A. Well my father was a salesman for Cluett Peabody, and as a youngster I checked his line, picked up orders from cases, and one thing another along retail and wholesale type.

Q. Then did you become a salesman yourself for Cluett Peabody Company? A. I became a salesman with Cluett Peabody myself.

Q. Following your father's footsteps? A. That's right.

Q. And just for the purpose of the record, what is the position of the Cluett Peabody in the shirt business? A. Well they are recognized as being the number one shirt house in America as far as dollar and cents volume is concerned.

Q. And what kinds of shirts do they handle? A. Dress shirts, sport shirts, neckband shirts.

Q. And after leaving Cluett Peabody & Company what did you do? A. I went into the retail business, in merchandising in three men's furnishing stores in Iowa.

Q. Handling shirts? A. Handling men's wear and shirts, sports shirts, sports wear.

Q. And after that what did you do? A. Then I went with the Reliance Manufacturing Company who are also manufacturers of men's wear and shirts, sports shirts, wearing apparel.

Q. Is that a large manufacturing company? A. I believe they are recognized as the largest cutters of cotton goods in the country, of yardage, goods.

Q. That's a little bit technical when you say they are recognized as the largest cutters of cotton goods, what do you mean by that? A. Well by yardage, by the number of yards of piece goods that they consume in their manufacturing operation, they are recognized as being the leader in that particular phase of the manufacturing business in textiles.

Q. Well does that include shirts? A. That includes shirts.

Q. Sport shirts too? A. Sport shirts.

Q. And after leaving Reliance with what company did you become associated? A. Then I merchandised three men's furnishing stores in Chicago.

Q. And did you subsequently become associated with the Mack Shirt Company? A. Subsequently to that I became associated with the Mack Shirt Corporation.

Q. In what year did you become associated with them? A. In 1944.

Q. And in what capacity? A. As a salesman in the Chicago-Wisconsin territory.

Q. In your prior experience which you have related, did you become familiar with practically all of the shirts, particularly sports shirts which were being sold commercially, in the men's furnishing goods stores, in the areas that your business took you into? A. Well I would say to a greater degree that is exactly right.

Q. When did you first learn about or actually see rather the patented shirt of which Mr. Brohard is the inventor? A. Mr. Guckes who is a——

Q. You'd better spell that name. A. Mr. Guckes—G u c k e s, is the sales executive vice president of the Mack Shirt Corporation, came to Chicago on a business trip and amongst other things he had this particular garment, and——

Q. When was that? A. This was in 1946. And without asking or soliciting any information from me threw the garment on the bed and asked me what I thought of it, and I looked at it and with the experience that I have had in the shirt business, it was extraordinary and displayed creative ingenuity that had gone into the garment, it was definitely different from anything that I had ever seen, in either the men's dress shirt or the men's sport shirt field.

It was novel and in my opinion I thought had a terrific future and I made the suggestion to him——

Mr. Horton: I object to conversation.

Judge Druffel: Yes.

By Judge Marx:

Q. Now following that did you show the garment to any of your, any of the trade in Chicago or Wisconsin? A. Yes, I might start this way, the garment had not been given to me or offered to me for sale, I had merely seen it and I was tremendously impressed with the potentialities of it and I happened to have an engagement with, appointment with Mr. Ridenour, President of Baskins, but who then was merchandise manager, and to talk about something else in the sport shirt field. This was in 1946, drawing late to the fall of the year, and the particular phase that we were going through in the sport shirt industry was it was demoralized, the goods were being offered at ridiculous prices, buyers were——

Judge Druffel: You see all of that doesn't mean a thing, ridiculous prices up or down, too expensive or too cheap. Say a fact, don't characterize it, just say what was a fact.

A. (continuing) Well the market was out of the sport shirt field. I mean that generally speaking it was tough, tough sledding.

Judge Druffel: Now, that——

Judge Marx: Now I'd better ask some questions.

By Judge Marx:

Q. First place, who were Baskins? A. Well they're one of the fine, the outstanding stores in the West.

Q. And when you say that the sport shirt business at that period was demoralized, do you mean that the business was——

Mr. Horton: Ask him what he means, rather than you tell him.

Judge Marx: Well I wasn't going to tell him anything, I was going to give him a choice.

By Judge Marx:

Q. Well what do you mean by that? A. Well when I say demoralized I was over there to set up promotion on sport shirts, and Ridenour told me he was getting ready to go down to New York to revise and cancel orders, that the sport shirt market had broken and they weren't——

Mr. Horton: Just a minute, did somebody tell you this?

The Witness: I experienced this.

Mr. Horton: Well did you say now that Mr. Ridenour told you this?

The Witness: No he made the statement to me.

Mr. Horton: Well I object now to what Mr. Ridenour said.

Judge Druffel: Well are you trying to tell us that the shirt market was glutted and that they weren't moving and this shirt came along and revitalized the business?

The Witness: Yes sir.

Judge Druffel: Let's have it that way then. We waste too much time on all this characterization.

The Witness: At any rate, Your Honor, I merely brought out the fact of the construction of this sport shirt to Mr. Ridenour, and what impressed me about the whole thing was that he immediately, because we were going through this period and he thought there was no market in sport shirts, he was very very interested and wanted to commit himself to the goods, that's what impressed me about it.

By Judge Marx:

Q. Well now will you relate as quickly as you can, what the public acceptance, buyers' acceptance and the public's acceptance of this merchandise was in your territory when you introduced it?

Mr. Horton: Well I think I object to that, but this matter of stated volumes or sales, I wouldn't have any objection to him giving figures. I don't think he ought to give his conclusions as to what the public acceptance was.

Judge Druffel: That's right, the——

Judge Marx: Well we'll supply the sales by another witness, I just wanted, he's the one who introduced it into the market.

Q. Well what was your experience with respect to the sale of this shirt? A. Well the original or the opening order that was eventually placed by Baskins was for 14 dozen goods. 14 dozen of this patented goods, and the gentleman concerned was so interested in the shirt that he said he was going to run a newspaper advertisement on it——

Mr. Horton: I will object to what he said.

By Judge Marx:

Q. Well just state whether he did run a newspaper ad. A. He ran a newspaper ad.

Q. Now just a minute, just stop there, we want to show you the ad, well, we don't seem able to find it right now, you say he did run an ad? A. He ran an ad, yes sir.

Q. Was that an expensive ad, or otherwise? A. Very expensive ad, very expensive.

Q. You know approximately what advertising costs there? A. I would hazard a guess of maybe two thousand dollars, or somewhere near that.

Q. Was any of that paid for by your company? A. No sir, it was not.

Q. What was the Mack shirt known as? A. The Flightmaster.

Q. Now what other acceptance do you know of in connection with your territory. A. Well there was any num-

ber of instances where I was offered astronomical figures, dozens and dollars and cents in orders that I couldn't accept for the simple reason my company wouldn't accept the business, accept the orders as they weren't in position to deliver them at that time. Orders running up to seven, eight, nine thousand dollars, which to me was a very very very large amount.

Q. Well now on that subject of price, at the time you speak of what were the, what were sport shirts then on the market selling for, approximately? A. Oh, five, six, seven, eight dollars.

Q. And you say that, were those the shirts that you had reference to that had tough sledding? A. They're conventional sports shirts.

Q. When you spoke that the market was glutted with shirts—— A. Sport shirts, yes sir.

Q. Was that the price range in which the market was glutted? A. They were beginning to promote and sell goods to get rid of them at those prices, and the old ones.

Q. And your shirt was priced at what figure? A. $10.00.

Q. Notwithstanding that your shirt was priced at several dollars above the then prevailing price you say that you were, you received these orders? A. Yes, the ad was run within a couple hours that Mr. Ridenour had gone to New York his assistant called me and when I saw the ad I realized we weren't going to be able to back it up if there was any reaction to it at all, and the reaction was phenomenal, the goods were sold out and the buyer called up and said they were having people come in the store, they were turning them away by the dozens, I had to get them more shirts.

Mr. Horton: Well I object to the statements as to what the buyer had to say.

Judge Druffel: Yes the objection will be sustained. Did you order more shirts?

The Witness: All that we could get, the second day after the ad was run the mail orders, they had inserted a coupon in the newspaper and the mail orders started to pour in, from Michigan, Ohio, Indiana, Illinois, Wisconsin, and they were after me to get more goods to back up these mail orders, in addition to the general calls that they were having.

By Judge Marx:

Q. At that time were there any shirts on the market of a similar design or containing the patented features of this shirt? A. Not at that time there wasn't.

Q. When did, did any shirts subsequently come on the market having, which in your opinion copied or imitated the design or patented features of this shirt?

Mr. Horton: I object to that generalization, were copied or imitated. If he has any particular shirt in mind then let him state what it is.

Judge Marx: It's just preliminary to identifying, and ask him if any did, if he says no that precludes the question, if he says yes then I can follow it up.

Judge Druffel: Oh he may ask him if any shirts appeared on the market that were similar in any respect to these shirts in this——

By Judge Marx:

Q. Did any shirts appear on the market which were similar in any respect to this patented shirt? A. Yes sir.

Q. When did they begin to appear? A. I believe in 1947.

Q. And what shirts began to appear? A. The Corsair.

Q. I show you Exhibit 1, I believe, and ask you if that is the shirt, I don't mean the particular shirt, but the Cor-

sair type of shirt that you referred to in your evidence. A. This is the shirt, this is the garment that appeared in the market that I was selling.

Q. Subsequently were any other shirts——

Mr. Horton: I object, you mean other shirts made by the same people?

Judge Marx: No.

Mr. Horton: Well I object to talking about shirts that may have been made by some other competitors.

Judge Druffel: Yes, we're going now to the shirts in issue here.

Judge Marx: We'll pass that point for the present but we want to perhaps bring it up again.

Judge Druffel: Here you might as well understand it now the Squires Company are the defendants and they are charged with selling this Corsair which infringes the other shirt here and I don't see how——

Judge Marx: Well I said we'd pass that for the present. By Judge Marx:

Q. What occurred with reference to the general market that you had developed for the patented shirt, after this infringing shirt began to appear, on the, this shirt, exhibit 1, began to appear on the market? A. Well the first thing that happened, the accounts that I had sold goods to, and where our delivery dates were——

Mr. Horton: If Your Honor please I think this is all very outside the issues of this case. It sounds, from the way the examination is going, that they are trying to try Spectator Sportswear, Inc., or whoever manufactured this shirt, whereas the defendant in this case is Squires, Inc., and they are charged with selling them in this territory. I think that the issues in evidence ought to be limited and I do object to it.

Judge Druffel: Well I think it's one thing to establish the utility and novelty of the patent in suit and the damage feature is a later issue.

Judge Marx: Well I'll ask just this one additional question on that point.

By Judge Marx:

Q. Approximately at what time did your business in the patented shirts begin to fall off? Was it before or after the Corsair shirt began to appear on the market?

Mr. Horton: Well I object, to that because there isn't any testimony in here that business had fallen off.

By Judge Marx:

Q. Well did your business fall off?

Mr. Horton: Why should it, and I object to that as being irrelevant to this case.

Judge Druffel: Yes.

Judge Marx: I won't argue it, I just offer to prove that their business did begin to fall off and it began to fall off shortly after the appearance of the Corsair shirt.

Judge Druffel: Well that, all right, let it go that way.

Judge Marx: You may cross examine.

## CROSS EXAMINATION

By Mr. Horton:

Q. When did you start to work for the Mack Shirt Corp? A. 1944.

Q. And before you worked for Mack where were you employed? A. In men's furnishings in Chicago.

Q. When were you employed by the Reliance Company? A. 1933 to approximately 1939.

Q. In 1933 to 1939 was the sport shirt business a large business? A. Relatively no.